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IN THE

Supreme Court of the United States

October Term, 1943.

No. 336.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HEARST PUBLICATIONS, INCORPORATED,

Respondent.

BRIEF OF RESPONDENT, HEARST PUBLICATIONS, INCORPORATED.

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HEARST PUBLICATIONS, INCORPORATED,

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BRIEF OF RESPONDENT, HEARST PUBLICATIONS, INCORPORATED.

Respondent, Hearst Publications, Incorporated, publisher of the "Los Angeles Examiner," presents the following brief in support of the affirmance of the decree of the Circuit Court of Appeals [R. 1852, 1853].[1]

Opinion Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 136 Fed. (2d) 608 [R. 1843 *et seq.*].

Jurisdiction.

The Board's petition for writ of certiorari, filed on September 9, 1943, was granted on October 25, 1943. Jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. A. sec. 151 *et seq.*), herein called "the Act".

[1]Herein references to pages of the record are designated: R. Italics throughout this brief have been supplied.

Statement of the Case.

The decree [R. 1852, 1853] of the Circuit Court of Appeals here under review denied enforcement of and set aside an order of the National Labor Relations Board [R. 455; 39 N. L. R. B. 1256]. Such order had directed that this respondent cease and desist from its refusal to bargain collectively with a newsboys union as the exclusive bargaining representative of newsboys engaged in street sales of respondent's newspaper, the "Los Angeles Examiner" [R. 476]. Such order had been made by the Board on March 30, 1942 in a complaint proceeding, and the latter had been preceded by a representation proceeding wherein the Board on January 9, 1941 had concluded [R. 108] that such newsboys were respondent's employees under the Act, and had determined [R. 119] upon the unit of such newsboys appropriate for collective bargaining under the Act.

The record discloses the following with respect to respondent's organization for the wholesale distribution of its newspaper, and the operations of the newsboys.

Respondent's Organization for Wholesale Distribution.

The "Los Angeles Examiner"[2] was distributed throughout California, "but principally in the metropolitan area

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[2]It was stipulated [Bd. Ex. 18] that the publication and distribution of this newspaper was a "separate business enterprise wholly owned by Hearst Publications, Incorporated," which owned other newspapers and publishing subsidiaries, but that none of the latter had "any connection or relation with either the manufacture, publication, sale or distribution of" the "Los Angeles Examiner" [R. 69, 70, 71, 72]. It should be understood that references herein to activities of "this respondent" are to that department of Hearst Publications, Incorporated, which conducts the publication and distribution of the "Los Angeles Examiner."

of Los Angeles" [R. 73], and 2% of its daily and 8% of its Sunday issues were distributed outside of California [R. 74].[3] Within California home deliveries and newsstand sales accounted for about 80%, and sales by all newsboys for about 20% of the total [R. 1560, 1561], but sales by newsboys coming within the definition of "newsboy" adopted by the Board [R. 112, 113, 114] would account for considerably less than 20% of California sales [R. 1562].

The daily and Sunday editions [R. 69] of the "Los Angeles Examiner" were distributed to newsboys, to newsstands, to independent dealers, to district headquarters for home delivery, and to trains and busses for outlying points [R. 1353]. Under the newspaper's circulation director, Mr. Black [R. 668, 1354], and the circulation manager, Mr. Weisbecker [R. 1349], were three departments: the night street department under Mr. Hampson; the morning street department; and the suburban and country department [R. 1355], the latter handling in the main territory outside the City [R. 1356].[4] The morning street department included the "A. M. independent dealers," the "10-mile independent dealers," and "the downtown street sales" under Mr. Seebolt [R. 1355, 1356]. The "A. M. independent dealers" and the "10-mile independent dealers" were "strictly independent dealers" [R. 1360] and there was no testimony disclosing their operations.

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[3]Of its *combined* daily and Sunday average circulation of 263,848 copies, only 9,909 copies, or 4%, were sold or distributed outside of California [R. 74].

[4]It was stipulated that the newsboys in this area were not involved in this proceeding [R. 1359, 1360].

Messrs. Weisbecker [R. 1349, 1555], Hampson [R. 1362, 1567], and Seebolt [R. 1373] appeared as witnesses.

Under Mr. Hampson (night street department) there were 15 regular district men [R. 1364], who were paid employees of the newspaper. Four of these district men, Mr. Volanty [R. 1514], Mr. Navarro [R. 1432], Mr. Jackson [R. 1442], and Mr. Pierce [R. 1529], appeared as witnesses. There were no district men under Mr. Seebolt (morning downtown street sales) [R. 1375].

So far as this respondent is concerned the only newsboys dealt with by the Board were newsboys within the Board's definition of appropriate unit[5] to whom sales of newspapers were made by the night district men (under Mr. Hampson), and by Mr. Seebolt, who was in charge of morning downtown street sales.

Neither this respondent nor any of its representatives had any list of the names of the newsboys to whom its

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[5]The Board's decision and direction of elections of January 9, 1941 [R. 77] found the following unit to be appropriate as to this respondent [R. 112]:

> ". . . all newsboys engaged in the street sale of the . . . Examiner at established spots 4 or more hours a day, 5 or more days a week, within Los Angeles, California, except temporary newsboys"

and the terms "established spot" and "temporary newsboy" were defined as follows [R. 113, 114]:

> ". . . the term 'established spot' . . . refers to a place where a newsboy has engaged in the street sale of the . . . Examiner . . . 5 or more days a week for a period of 6 consecutive months or more, and the term 'temporary' newsboy . . . includes a newsboy who has engaged in the street sale of the . . . Examiner . . . at an established spot for 30 days or less."

newspapers were sold by the night district men and by Mr. Seebolt [R. 1349, 1402, 1403]. Sometimes the company's district men knew the newsboys only by their first names or nicknames.[6] Moreover, the number of newsboys to whom a district man would sell newspapers would vary from night to night, "according to how many show up" [R. 1521] and there were "plenty" of newsboys who handled respondent's newspaper for only one or two nights a week [R. 1573], while some newsboys handled only the Sunday editions [R. 1385, 1386]. Some newsboys within the Board's "appropriate unit" worked at other jobs during the period they were selling respondent's newspapers.[7]

Night Street Sales.

Each of the night district men called at the newspaper plant for a quantity of newspapers, determined by himself [R. 1365], at about 6 o'clock in the evening [R. 1363]. Each called again at the plant before 2 o'clock the following morning to pay for the papers received the evening before or return unsold papers [R. 1363, 1364, 1434]. In the territory covered by these night district men there were

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[6]Thus, night district man Navarro did not know the last names of the "main spot" boys at Pico and Vermont Avenue, and at Washington and Vermont Avenue in his area [R. 1438]. Thus, night district man Pierce knew newsboy Celestino Sanchez only as "Solly" [R. 1533, 1534, 1545, 1546].

[7]Newsboy Barrett testified that he was a carpenter by trade and sometimes "took an odd job in the daytime" [R. 1425].

Newsboy Sanchez testified that while he was selling respondent's newspaper at the Southern Pacific depot he was operating a bootblack stand [R. 1488].

about 500 newsboys[8] [R. 1565, 1566]. Each of these newsboys received delivery of quantities of newspapers from a night district man, paying therefor a wholesale price,[9] and resold such newspapers to the public at the resale price[10] established by the newspaper. Thus the money made by these newsboys was the difference between what they paid for the papers and the price at which they sold them [R. 92, 1531, 1566].

None of these newsboys received any wages, bonus or other compensation from the newspaper [R. 1557].[11] These newsboys were not instructed that they were not to sell newspapers, other than the "Los Angeles Examiner," or magazines [R. 1531, 1566].

These newsboys were not required to report at the newspaper plant, but if they did go there and request transpor-

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[8]In addition to these there were "plenty" of newsboys who handled the paper for only one or two nights a week [R. 1573]. The number of newsboys serviced by a district man would vary from night to night "according to how many show up" [R. 1521].

[9]This was 3¢ per copy for a certain number of daily editions and 1½¢ per copy for quantities in excess of such number [R. 1365, 1570]. For Sunday editions the wholesale price was 8¢ per copy [R. 1391].

[10]This was 5¢ per copy for daily editions; 10¢ per copy for Sunday editions.

[11]The night district men received "strict instructions" not to pay money to newsboys [R. 1571]. Night district man Navarro violated these instructions by giving his "main spot" boys "a few nickels . . . a little extra money" for giving the "off spot" boys their supplies of papers [R. 1437, 1438]. Night district men, Volanty [R. 1519] and Pierce [R. 1531], on the other hand, testified positively that they did not give money to newsboys.

tation to the places where they were to sell their papers, such transportation was provided [R. 1566].[12]

These newsboys were not told to use change aprons [see R. 1369 for an illustration of one of these aprons], but in cases where they requested it they were given such aprons [R. 1567]. They were not told to wear caps or any particular kind of article of apparel.[13]

Sometimes the night district men were furnished with advertising "placards" similar to Bd. Ex. 7 [R. 755, 1366, 1371] and maps advertising the newspaper [R. 1366] mounted on cardboard [R. 1590, 1609].[14]

Morning Street Sales.

Mr. Seebolt, in charge of morning downtown street sales, distributed papers to 58 or 60 newsboys [R. 1380]. On week-days he usually left the plant about 4:45 A. M. [R. 1374] to make his first round, later "re-covering" the

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[12]This privilege seems to have been availed of by comparatively few newsboys. Thus, night district man Volanty testified that while he supplied papers to about 35 newsboys [R. 1521] never more than one or two newsboys would ride out with him; sometimes none would do so [R. 1524]; that he never told those who did ride with him that they had to do so [R. 1526]. Night district man Pierce testified that he never took anyone in his car [R. 1532].

[13]Mr. Hampson testified that upon occasion the newsboys wore caps or other articles of apparel advertising the products of someone other than the "Los Angeles Examiner" [R. 1571, 1572].

[14]The only testimony as to what was done with these advertising materials came from night district man Pierce, who testified that he put them up himself [R. 1537, 1547], and from newsboys Sanchez, Nation and Nixon, who testified that they themselves put up advertising maps left with them by Pierce [R. 1485, 1486, 1580, 1607].

locations in his area a second and third time [R. 1374]. On Sundays he left the plant at 3 A. M. [R. 1385].. Mr. Seebolt did not transport any newsboys to their selling locations [R. 1390]; did not handle any placards or maps or tell the newsboys they should display these [R. 1391; 1392]; never handed out change aprons,[15] unless a newsboy himself requested one, in which case Seebolt would tell him he would try and get him one [R. 1391]; and for two years had not handled any news racks or boxes [R. 1391].

None of the newsboys purchasing from Mr. Seebolt received any wages, bonus, or other compensation from the newspaper.[16]

Newsboys' Sales Territory.

Before taking up a location, a newsboy would usually make inquiry of the district man for the purpose of ascertaining whether newspapers would be sold and delivered to

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[15]Mr. Seebolt testified that newsboys in his territory would wear change aprons with some name on the apron other than "Los Angeles Examiner" [R. 1391]. Confirmation of this occurred at the hearing before the Trial Examiner, when Examiner newsboy Johnson took the witness stand wearing a "Herald" apron [R. 1618].

[16]Mr. Seebolt had an arrangement with two men, known to him as "Marsh" and "Harry," whereby Seebolt paid these men *out of his own pocket* to count out newspapers at Seventh and Grand and Second and Spring Streets, respectively [R. 1379, 1380, 1398]. "Marsh" sold the Times, Daily News and Examiner at Seventh and Grand, while "Harry" sold the Times and Examiner at Fifth and Hill Streets" [R. 1387, 1388].

him at such location.[17] The newsboys themselves realized the wisdom of avoiding conflict by encroachment upon territory already preempted by others.[18]

At a given street intersection where newsboys sold papers, the "best" corner would often be referred to as a *"main spot"* and other corners or locations as *"off spots"* [R. 1437]. A newsboy selling papers to automobiles in traffic or at safety zones would be said to be selling at a *"traffic spot"* [R. 1435].

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[17]Thus, newsboy Sanchez, learning that Fifth and Main Streets was "open," went to Pierce, night district man, and said he would like to have it. Pierce did not tell him he could sell there, but did tell him "how many papers the corner would sell" [R. 1547]. So a newsboy, learning that another newsboy selling at Beverly and Western Avenue had quit that location, came to night district man Volanty and asked the latter if he could have that spot. Volanty replied that he didn't see any reason why he shouldn't have it and told him how many papers the corner ordinarily sold [R. 1526]. There was similar testimony by night district man Navarro [R. 1436, 1437]. Night district man Jackson testified, ". . . I don't put any newsboys on any corner. If I have a spot open, if a fellow asks me if I have anything open, I will tell him where it is, and I sell the newspapers to him and he goes out there himself" [R. 1442].

[18]In the opinion of the court below it is said: "Since the place of business of a newsboy is a public street or sidewalk, neither the publisher nor the boy has any proprietary right to any 'corner' or locality. The fact that the newsboys do not encroach on one another's territorial jurisdiction is principally a result of a tacit understanding between them based in large measure, it would seem, upon the old law of prior possession and ability to defend a squatter's privilege" [R. 1851].

Sales of Territory by One Newsboy to Another.

The record discloses a number of instances of a sale of a corner by one newsboy to another newsboy.[19] These sales were not engineered or promoted by the newspaper. They were transactions between the newsboys themselves.

Hours During Which Newspapers Were Sold.

Street sales of the daily newspaper by newsboys commenced after 6 P. M. in the evening, and continued until some hour before or after midnight [R. 1434], being resumed in the morning at about 5 A. M. [R. 1374] and continuing not later than 10:30 A. M. [R. 1397]. Sales of the Sunday paper commenced about 3 P. M. on Saturday afternoon [R. 1608], and the last edition came out at 3 A. M. Sunday morning [R. 1385].

The newsboys were advised or knew when and where delivery of the first edition would be made to them, and

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[19]Newsboy Relish, who sold the Examiner as well as the Herald and various magazines, testified that he bought his corner from newsboy Soel for $100 [R. 736]. Newsboy Bryant, who sold the Herald and News and sometimes the Examiner and Times, as well as magazines, testified that he purchased one corner from newsboy Faber for $600 and sold another corner to Faber for $250 [R. 922, 923]. Newsboy Schullman, one time treasurer of the Union, testified that he purchased his corner from newsboy Levinson by weekly payments to the latter aggregating about $1200 [R. 930, 931]. Newsboy Gallagher testified that he bought his corner from a newsboy for about $300 [R. 939]. Newsboy Newman testified that he purchased his corner from another newsboy for about $250 [R. 945]. Mr. Comorre, the Union organizer, testified concerning the purchase of a corner by his brother-in-law, newsboy Powers, for $150 [R. 999, 1000, 1001, 1002].

they were usually there to receive such delivery.[20] Subsequent editions when available were delivered to them [R. 1374, 1433, 1434, 1519, 1520, 1544]. As already pointed out, the newsboys were not required to accept transportation to or from the locations where their sales were conducted [R. 1390, 1524, 1526, 1532, 1566].

When the newsboys had sold all they felt like selling they stopped and went to the publisher's representative to make payment for what they had sold. In the case of night sales, this was any time between 11 P. M. and 1:30 A. M.[21] In the case of morning sales, this was between 9:30 A. M. and 10:30 A. M.[22]

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[20]Mr. Seebolt, in charge of morning downtown street sales, was asked if he instructed newsboys to "show up at a given corner or place to receive their papers." He testified that if a newsboy asked him when papers were to be dumped at a certain corner or location, he would tell him in advance, but that aside from this he did not issue instructions to newsboys that they "must show up at a given spot to receive their papers at a given time" [R. 1394, 1395]; that most of the newsboys "have all known for years down there, just the same as I know, when to come down" [R. 1397].

[21]Night district man Navarro testified: "Q. Do you make your collections each night from the newsboys . . . ? A. I do. Q. And during what hours do you make those collections? A. *When they are ready to quit and go home.* Q. And during what hours is that? A. Well, they vary. Some of them quit at 11:00 o'clock, 12:00 o'clock, 1:00 o'clock, 12:30, 1:30" [R. 1434].

Newsboy Buhl testified that he "checked in" at 1 a. m. [R. 1623], while newsboys Deering and Sanchez, selling in the same district as Buhl, testified that they "checked in" at 12:30 a. m. [R. 1502] and at 1:30 a. m. [R. 1487], respectively.

[22]Mr. Seebolt, in charge of morning downtown street sales, testified that some of the newsboys "started" to "check in" at 9:30 or 9:45 a. m., but that he himself was "there" until 10:30 a. m. [R. 1397].

Methods Used by Newsboys in Attracting Customers.

Methods to be used in attracting customers were determined by the newsboys themselves.[23] There was no evidence that the newsboys selling this respondent's newspaper were ever instructed how they should "call" or display their papers to prospective customers.

The Newsboys' Profit.

The newsboys purchased their newspapers at a wholesale price and derived their entire profit from their retail sales at a higher price.[24] The volume of such profit was of course dependent on their success in conducting such retail sales. The company did not curtail the quantity of merchandise which they could purchase. They accepted delivery of a certain quantity of newspapers. If they

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[23]Mr. Seebolt, who was in charge of morning downtown street sales, testified that "some newsboys call their papers and some don't call them very much"; that he did not issue instructions to the newsboys as to how they shall call their papers; that he left it entirely up to the newsboys as to "whether they shall call the papers at all or not" [R. 1392, 1393].

Newsboy Seklemian testified that he did what he believed to be best to dispose of his newspapers; that he did whatever he thought "works . . . in order to sell" his papers [R. 1413].

There was no evidence that any newsboy selling this respondent's newspaper was ever instructed how he should carry or display the paper or that he should give it preferential display over some other newspaper he carried for sale.

[24]This was the Board's finding [R. 92].

wanted more they could have them.[25] If they did not sell all they had taken, they could return the unsold copies [R. 91]. Respondent had no "checkmen," if by that term is meant newsboys who received money or checks from the company for services performed.[26]

Credit Extended by Newsboys to Their Customers.

The question whether credit should be extended to customers was determined solely by the newsboys themselves.[27] Each day they were required to pay the publisher for all papers received less papers unsold and returned to the publisher's representative [R. 1384, 1434, 1527]. The Board found that "the newsboys absorb losses resulting from poor credit risks" [R. 110].

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[25]Mr. Seebolt, who was in charge of morning downtown street sales, testified that if a newsboy requested more papers then were handed him, such request was as a matter of practice complied with [R. 1393].

While newsboy Nixon testified that he did not determine the number of papers he received [R. 1606], he also testified that he never complained to the district man about not getting enough papers [R. 1609]. Newsboy Buhl testified to the same effect [R. 1624].

[26]At the hearing before the Trial Examiner the Board's attorney stated that he understood that "checkmen" designated men "who received checks from the various papers" [R. 587]. The Union's organizer had the same understanding [R. 854]. The Board's findings defined "checkmen" in the same way, stating that: "For his services in redistributing newspapers the checkman receives a small salary from the publisher. He is carried on the publisher's payroll" [R. 90]. *This respondent had no newsboys in this category* [R. 1557].

[27]Newsboy Seklemian testified that he had about 43 "regular customers"; that sometimes he would extend several days' credit to certain of these customers [R. 1416, 1417].

Sales of Other Publications by Newsboys.

As a general practice the newsboys sold more than one newspaper and handled magazines.[28] Of course there could be no allocation of the time spent in selling these several publications.

Employment of Assistants by a Newsboy.

The Board found that "some newsboys occasionally hire others to sell newspapers on a commission, or straight stipend basis" [R. 110, footnote]. The testimony discloses instances in which a newsboy hired others to assist him, and made a profit by so doing.[29]

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[28]This was the Board's finding [R. 106; see also R. 110].

[29]Newsboy Sanchez testified that while selling the "Los Angeles Examiner" at the Southern Pacific depot he was operating a boot-black stand; that he had "some boys working for" him at that location "selling Examiners"; that he took care of the compensation of these boys [R. 1488, 1489]; and that he made a profit on the papers they sold [R. 1492].

Newsboy Schullman, one time treasurer of the Union, a Herald and News newsboy, who also handled a few Examiners as well as magazines [R. 932], testified that he employed 5 newsboys to assist him, paying them according to their sales of newspapers he bought and turned over to them, and that he made a profit on these activities [R. 931, 932, 937].

Newsboy Gallagher, who handled the Herald, News, Examiner, Times and other publications and magazines, employed 5 newsboys on the same basis as newsboy Schullman [R. 939, 940].

Newsboy Newman testified that he employed three boys as his assistants on salary and commission [R. 946].

Newsboy Klein, first president of the Union, who handled the Herald, News, Times and Examiner, employed two assistants, one of whom covered the corner at 30¢ per hour paid by Klein, and one of whom sold newspapers in traffic at 35¢ per hour paid by Klein [R. 982].

Cooperation Between Newsboys Selling Competing Publications.

The newsboys exercised the right to cooperate with other newsboys selling competing publications for their mutual benefit.[30]

Summary of Argument.

The argument which follows will be presented under the following points:

I. The newsboys engaged in selling this respondent's newspaper were not "employees" under the National Labor Relations Act.

(1) Unless the newsboys were "employees," respondent could not have been guilty of an "unfair labor practice."

(2) The meaning of the word "employee" in the Act is a legal question for the determination of the Court.

(3) The word "employee" used in the Act must be given its judicially settled meaning.

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[30] Newsboy Seklemian testified that on his corner, by arrangement with the Times newsboy, he handled "the Times for the Times fellow . . . as a courtesy to the public as well as to my fellow worker," and that as a result of this arrangement the Times newsboy did the same for him; that this arrangement included also the Herald newsboy. [R. 1417, 1418].

Newsboy Nixon testified that he would sell the News for the News newsboy when the latter was absent, and that the News newsboy did the same for him when he was away; that when the News newsboy quit for the night he gave Nixon two copies of the News, which Nixon could sell, retaining the full selling price [R. 1612, 1613].

Newsboy Johnson testified that he handled the Times, the Herald and the News as an accommodation to the other newsboys selling these newspapers, making the "regular profit" on these sales [R. 1617].

(4) Unless the word "employee" as used in the Act be given its judicially settled meaning, the Act is unconstitutional.

(5) According to its judicially settled meaning the word "employee" connotes one who performs services under conditions which give the one for whom the services are performed power of complete control and direction, not only as to the result to be attained, but over the details and means by which that result is accomplished.

(6) The basic findings of the Board do not support the conclusion that the newsboys were employees of this respondent.

(A) Certain basic findings of the Board do not support the conclusion that employment existed, for under the settled course of judicial decision determining when employment arises, such findings even if supported would not tend to show an employee status.

(B) The remaining basic findings of the Board do not support the Board's conclusion that the newsboys were employees of this respondent, for there was no substantial evidence showing that such findings were true as to this respondent.

II. The bargaining unit designated by the Board was not an "appropriate" unit.

(1) Unless the unit designated by the Board was "appropriate" for collective bargaining, respondent could not have been guilty of an "unfair labor practice."

(2) The Board's designation of a bargaining unit was not supported by findings showing it to be an appropriate unit.

ARGUMENT.

I.

The Newsboys Engaged in Selling This Respondent's Newspaper Were Not "Employees" Under the National Labor Relations Act.

(1) Unless the newsboys were "employees," respondent could not have been guilty of an "unfair labor practice."

The Board concluded [R. 475] that this respondent had engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act. But unless the newsboys in question were this respondent's "employees" and this respondent was their "employer," no "unfair labor practice" occurred, and the Board was without authority to proceed under Section 10 of the Act. This is made clear by the terms of the Act.[31]

(2) The Meaning of the Word "Employee" in the Act Is a Legal Question for the Determination of the Court.

Before considering whether the Board's findings support its conclusion that the newsboys were "employees" it is necessary to know the *meaning* of the word "employee" as used in the Act. Until we know what the statu-

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[31]This section reads:

"Sec. 8. It shall be an unfair labor practice for an *employer*—(1) To interfere with, restrain, or coerce *employees* in the exercise of the rights guaranteed in section 7.

* * * * * * * * * *

(5) To refuse to bargain collectively with the representatives of his *employees*, subject to the provisions of section 9 (a)."

Section 7 referred to in Section 8 (1) reads:

"Sec. 7. *Employees* shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

tory standard ("employee") means, we cannot say whether the facts fall within or without such standard.

Is a determination of the *meaning* of this term "employee" a judicial or an administrative function, is this a question of law for the Court, or a question of fact for the administrative body?

We contend that this is a question of law to be determined by the Court; that it is for the Court to resolve conflicting contentions as to the meaning of the term "employee," and thereupon consider whether such administrative fact findings as are supported by substantial evidence bring the case within such meaning.

Counsel for the Board contend[32] that the *entire matter* should be left to the determination of the administrative body. Thus, counsel say that in a case of this character "*the question as to whether particular facts brought a person within statutory language was a matter of judgment on which the decision of the administrative official was to be accepted if supported by evidence in the record* . . ." (petition for certiorari, p. 16). This is another way of saying that the Court should accept (a) the conclusion of counsel for the Board as to the meaning of the statutory standard ("employee"), even though that meaning be disputed, and (b) the conclusion of the Board that the facts fall within such statutory standard. Thus, counsel would give administrative finality, not only to administrative fact findings if supported by substantial evidence, but also to an assumed administrative construction of statutory language.

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[32]Citing *Gray v. Powell*, 314 U. S. 402 (1941), and other cases.

Two theories to rationalize the demarcation between fact and law in judicial review have been expounded.

There is the theory of Dean Landis that questions which call for solution by a trained body of non-legal experts should be classified as questions of fact and relegated to the administrative field; that questions which lawyers are equipped to decide should be placed in the legal field.[33]

There is the theory of Professor Brown that where further clarification of the meaning of the statutory standard is impossible or unnecessary, the matter will be classified as a question of fact and left to the administrative agency, but that where clarification of meaning is desirable in the interests of uniformity in the decision of future cases, a question of law is presented for judicial determination.[34]

In the instant case, an application of either of these theories will have the same result: the meaning of the word "employee" in the Act will be declared to be a legal question for the determination of the Court.

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[33]Landis, "The Administrative Process," 152 (1938).

[34]"When a court, in reviewing administrative action, sees in the impingement of the statutory norm upon the facts of the case the desirability of making a decision that will govern not only the immediate case but also a considerable body of future cases, it will assume jurisdiction of the question and resolve it by interpreting or defining the statute so as to meet the particular facts presented. If, however, the legal norm is incapable of further clarification, or if the facts of the individual case are so unique as to be incapable of generalized application, then the court perforce has no question of law available for its consideration and the determination of the matter must be left to the fact-finding agency."

Brown, *"Fact and Law in Judicial Review,"* 56 Harvard Law Rev. 899, 905 (1943).

Under the Landis theory, the meaning of "employee" cannot possibly be said to raise a question for a non-legal expert. The word itself has a peculiarly legal background and content. Its meaning presents a question "of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for [its] adjustment."[35] So in our case the Court, resorting to familiar legal rules, should determine for itself the meaning of "employee."

Under the Brown theory, the meaning of "employee" is a question of law for the Court and not a question of fact for final determination by the administrative body. Certainly clarification of the meaning of this term is both possible and desirable, and may be given generalized application in future cases. Congress intended that "em-

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[35]Quoted from the concurring opinion of Mr. Justice Frankfurter in *Driscoll v. Edison Light & Power Co.*, 307 U. S. 104, 122 (1939).

In *Maltz v. Jackoway-Katz Cap Co.*, 336 Mo. 1000; 82 S. W. (2d) 909, 913 (1935), the question presented was whether a workman was an *"employee"* under the Missouri Workmen's Compensation Act. It was contended that the findings and conclusion of the Commission "present only a question of fact" and that these were conclusive. Disposing of this contention the court said: "But we cannot agree to the proposition that the Commission's conclusion was one of fact. The whole of the discussion above, in the distinctions therein drawn, has developed that *the term employee is one of legal significance as determined by the application of fixed rules of law, and therefore presents a question of law, and we actually determined it as such.*"

In *Leigh Aitchison, Inc. v. Industrial Comm.*, 188 Wis. 218; 205 N. W. 806, 808 (1925), the question presented was whether a worker was an *employee* under the Wisconsin Workmen's Compensation Act. It was contended that the finding of the Commission on this question was conclusive, but in setting aside the Commission's award the court said: "No one could determine upon the evidence alone in this case whether or not Mrs. Aitchison was an employee. *It is only by the application of legal principles that that result can be arrived at.*"

ployee" should have a definite meaning applicable uniformly—not an uncertain meaning which would vary with the facts of each case.[36]

So a determination of the meaning of this legal term, "employee," should not be relegated to the field of administrative discretion, either on the theory that the Board has better expert qualifications than a court to cope with such determination, or on the theory that clarification of the Congressional standard is unnecessary in the interests of uniformity.

The curtailment of judicial review of an administrative determination applied in *Gray v. Powell*, was placed on two considerations: (a) that the determination of what constituted a "producer" of coal called "for *the expert, experienced judgment of those familiar with the industry*"; and (b) that the act of Congress *in express terms* had

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[36]"To recapitulate, the application of a statute to the situation disclosed by the evidence consists of two main functions: first, the definition or interpretation of the statutory norm, which is a matter of law; second, determining whether the facts disclosed by the evidence meet the demand of the norm as thus defined. The first of these functions—the law function of the court—is proper when the decision purports to establish a general rule. The second—the fact function reserved to the administrative agency—is the one involved when the limits of clarification and definition have been reached. It seems reasonably clear that when Congress in its statutes employed such terms as 'interurban electric railway,' 'spur, industrial, or side track,' and 'operation within the territory for which application is made,' it meant that the words used should have a definite meaning applicable uniformly to all who come within the purview of the general statute, and not an uncertain and variable one dependent upon the facts of various cases, which is necessarily true of such vague phrases as 'reasonable rate' and 'undue preference.' To give to words of the former kind a more precise definition is the task of the courts."

Brown, *"Fact and Law in Judicial Review,"* 56 Harvard Law Rev. 899, 916 (1943).

delegated this determination to the administrative body.[37] Neither of these considerations is found in our case. *Here a determination of what constitutes an "employee"* calls for the judgment of lawyers (a court), not laymen (an administrative board). Here such determination was not by the express terms of the statute confided to the administrative body.

The second ground for curtailment of judicial review, referred to above, *viz.*, that the act of Congress *in express terms* had delegated determination of the question to the administrative body, was the basis for the decision in *Shields v. Utah Idaho R. Co.*, 305 U. S. 177 (1938), cited in *Reed v. Powell*. Indeed, we venture the assertion that the only way in which the *Shields* case may be distinguished from *United States v. Idaho*, 298 U. S. 105 (1936) is upon this ground. In the *Shields* case the

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[37] In *Gray v. Powell* the Act expressly delegated (see 314 U. S. at 405) to the Director of the Bituminous Coal Division of the Department of the Interior the duty of determining whether the Seaboard railroad was a "producer" of coal under the Act. If so it was exempt from the operation of the Act. In the majority opinion the Court, through Mr. Justice Reed, said (p. 411):

> "In a matter *left specifically* by Congress to the determination of an administrative body, as . . . , here . . . the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner . . . Congress, which could have (p. 412) legislated specifically as to the individual exemptions . . ., found it more efficient to *delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable adjustment of the conflicting interests* . . ."

An application of the foregoing to our case is not warranted either (a) on the ground that Congress must be deemed to have *specifically delegated* to the Board a determination of what constitutes "employee," or (b) on the ground that the Board is *better qualified* than a court to determine this question. In our case there is no *specific* delegation, and the courts are better qualified than the Board to determine the meaning of this legal concept.

act of Congress had *expressly delegated* to the Commission the determination of what was meant by "interurban electric railway." In *United States v. Idaho* the act had not delegated to the Commission the determination of what was meant by "spur" track.[38]

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[38]In *United States v. Idaho*, 298 U. S. 105 (1936), the Interstate Commerce Act prohibited a carrier from abandoning any portion of its line without permission of the Interstate Commerce Commission, but provided that this "authority of the Commission" should not extend to the abandonment of a "spur" track. The railroad obtained permission from the Commission to abandon a certain line, the Commission holding that the latter was not a "spur" track. The lower Federal court considered the evidence before the Commission and new evidence and enjoined enforcement of the Commission's order, holding that the line was a "spur" track. In affirming this injunction this Court, through Mr. Justice Brandeis, dismissed the contention "that, since the findings and order of the . . . Commission were made on substantial evidence, they are conclusive" in these words: "For whether certain trackage is a 'spur' is a mixed question of fact and law *left by Congress to the decision of a court—not to the final determination of either the federal or a state commission.*" (p. 109.)

In *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177 (1938), the Railway Labor Act excepted "interurban electric railways" from its operation and *in express terms* "authorized and directed" the Interstate Commerce Commission, upon request of the Mediation Board "to determine after hearing" whether a railway line fell within this exception. The Commission determined that respondent was not an "interurban electric railway." The lower Federal court held otherwise. In reversing the decree of the latter and upholding the Commission's order, this Court, through Mr. Chief Justice Hughes, pointed out (p. 180) that Congress had the constitutional power to establish categories which should be excepted from the Act's operation; that (p. 182) Congress had *expressly delegated* this power to the Commission; that "unlike the case presented in *United States v. Idaho*, 298 U. S. 105, where the . . . Commission was denied the authority to determine the character of the trackage in question . . . . *the Commission in this instance was expressly directed to make the determination*" (p. 185) and that the Commission having made its determination the "sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious." (p. 185.) After considering the evidence the Court concluded that the Commission's determination was neither lacking in support nor arbitrary nor capricious.

The National Labor Relations Act does not contain any *express delegation* to the Board of power to determine what is meant by "employee". Therefore, our case falls within the rule of *United States v. Idaho*, and not within the rule applied in the *Shields* case and the *Powell* case, where there was express statutory delegation to the Commission of a power of determination.[39]

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[39]The *Railway Labor Act* (Shields case) provided (45 U. S. C. A., sec. 151) that "the term 'carrier' shall not include any . . . interurban . . . electric railway . . ." and that the "Interstate Commerce Commission *is hereby authorized and directed* upon request of the Mediation Board or upon complaint of any party interested *to determine after hearing* whether any line operated by electric power falls within the terms of this proviso . . ."

The *Bituminous Coal Act* (Powell case) provided (15 U. S. C. A., secs. 833 and 834) that the provisions of sec. 4 (relating to minimum and maximum code sales prices) "shall not apply to coal consumed by the producer . . ." and that "any producer believing that any commerce in coal is not subject to the provisions of" section 4 *"may file with the Commission an application . . . for exemption,* setting forth the facts upon which such claim is based . . . Within a reasonable time after the receipt of any application for exemption *the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application* . . ."

In the National Labor Relations Act there is no analogous or similar express delegation to the Board authorizing the latter to hear and determine the question of what is an "employee" under the Act.

In our case a determination of what constitutes an "employee" presents a *legal* question, calling for the judgment of the Court.[40]

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[40]In the following cases a question of statutory interpretation was held to present a question of law for the court's determination:

In *Federal Trade Commission v. Gratz*, 253 U. S. 421, 427 (1920), the meaning of "unfair method of competition" under the Federal Trade Commission Act was held to be a question of law. In *The Tax Line Cases*, 234 U. S. 1, 26 (1914), the interpretation of *"common carrier"* under the Interstate Commerce Act was held to be a question of law. In *United States v. United Verde Copper Co.*, 196 U. S. 207 (1905), the question presented was whether the use of timber from a public domain for smelting purposes was justified under an Act of Congress permitting use of such timber for "building, agricultural, mining or other domestic purposes." The Secretary of the Interior interpreted the Act to exclude use of such timber for smelting purposes. Disapproving the Secretary's interpretation, it was said (p. 215): *"The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. . . ."* See also: *Walker v. United States*, 83 Fed. (2d) 103, 106 (C. C. A. 8, 1936); *Hemmer v. United States*, 204 Fed. 898, 905 (C. C. A. 8, 1912; aff. 241 U. S. 379); *Jacksonville Paper Co. v. National Labor Relations Board*, 137 Fed. (2d) 148, 150 (C. C. A. 5, 1943, cert. den. 88 L. Ed. Adv. Op. 43).

Cases under state workmen's compensation acts, which hold that a reviewing court is bound by the fact findings of the administrative body if supported by substantial evidence, hold also that *whether facts found produce an employee relationship is a question of law, upon which the court will not be bound to accept the conclusion of the administrative body.* See—*Miller & Lux, Inc. v. Industrial Acc. Comm.*, 179 Cal. 764; 178 Pac. 960, 961 (1919); *Angel v. Industrial Comm.*, 64 Utah 105; 228 Pac. 509, 510 (1924); *Maltz v. Jackoway-Katz Cap Co.*, 336 Mo. 1000; 82 S. W. (2d) 909, 913 (1935); *W. T. Congleton Co. v. Bradley*, 259 Ky. 127; 81 S. W. (2d) 912, 914 (1935); *Krause v. Dept of Labor*, ... Wash. .....; 97 Pac. (2d) 1082, 1083 (1940); *Van DeGarde v. Osceola County Coop. Creamery Assn.*, ... Iowa .....; 4 N. W. (2d) 234, 236 (1942); *Williams v. Branum*, ... Okla. .....; 134 Pac. (2d) 352, 354 (1943).

(3) The Word "Employee" Used in the Act Must be Given its Judicially Settled Meaning.

The Act's definitions of "employer" and "employee" are set out below.[41]

Further enlightenment concerning what Congress intended by these words is not to be obtained from the debates in Congress preceding the passage of the Act.[42]

The definition of "employee" expressly includes individuals, who, under the conventional concept of that term as judicially defined, might not be employees, *i. e.*, individuals whose work had ceased as a consequence of labor

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[41]"Sec. 2. When used in this Act—

* * * * * * * * *

(2) The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

[42]In a communication presented on February 5, 1940, to a Special Committee of the House of Representatives Investigating the National Labor Relations Board (N. L. R. B. Ex. 137, Vol. 2, p. 636 of the verbatim record of that Committee published in 1940 by The Bureau of National Affairs, Inc., Washington, D. C.), the Board stated:

> "Sections 2 (1), and (2), and (3) defining person, employer and employee *were not discussed during the debates in Congress preceding the passage of the Act.*"

disputes or unfair labor practices and who had not obtained other employment.

If, as we contend, Congress intended that the word "employee" should connote the conventional concept of employee as judicially defined, then this express inclusion was not surplusage, for the word "employee" standing alone as judicially defined might not have included certain striking workmen[42] and would not have included discharged workmen; hence this express inclusion was necessary if those individuals were to be protected under the Act.

If, as counsel for petitioner seem to contend (petition for certiorari, pp. 19, 20), Congress intended that the word "employee" should connote all those included within the *"contours of the collective bargaining relation,"*[43] then why was it necessary for Congress to add express language to embrace striking or discharged workmen, and was not the express inclusion of such individuals pure surplusage?

That Congress has added to its definition of "employee" a category which would not have been included within the judicially defined concept of employee, plainly indicates (a) that Congress intended "employee" to have its judicially defined meaning, and (b) that Congress did not intend this

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[42]Certain decisions under the Clayton Act had held that a workman out on strike would not, under certain circumstances, be an "employee." *Dail-Overland Co. v. Willys-Overland, Inc.*, 263 Fed. 171, 188 (Ohio, 1919; aff. 274 Fed. 56); *Canoe Creek Coal Co. v. Christinson*, 281 Fed. 559, 562 (Ky. 1922; reversed on other grounds, 293 Fed. 379, 266 U. S. 42).

[43]Counsels' contention in the court below was equally vague, *i. e.*, that "employees" under the Act meant persons who *"function in a realistic economic sense as employees of an industrial enterprise"* [R. 1847].

judicially defined meaning to be enlarged except by the one addition for which it made express provision, *i. e.*, striking or discharged employees.

Except for this one *inclusion*, and the express *exclusion* of agricultural laborers, domestic servants and individuals employed by parent or spouse, the Act does not define "employee."

Under these circumstances it must be assumed that Congress intended that this term should connote the conventional concept of employee as judicially defined and understood at the time of the enactment. This was the view of the Court below.[45]

This position is supported by authorities which have dealt with the meaning of the word "employee" as used in a number of Federal statutes.[46]

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[45]The Court below gave to the word "employee" its "conventional meaning as developed under the common law and statutory enactments" [R. 1848].

[46]*Federal Employers' Liability Act* (45 U. S. C. A. Sec. 51).

"We are of the opinion that Congress used the words 'employe' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employe."

Robinson v. Baltimore & Ohio R. R. Co., 237 U. S. 84, 94 (1914).

Accord:

Hull v. Philadelphia & Reading Ry. Co., 252 U. S. 475, 479 (1920).

Federal Safety Appliance Acts (45 U. S. C. A., Secs. 1-46)

Stevenson v. Lake Terminal R. Co., 42 Fed. (2d) 357, 358, 359 (C. C. A. 6, 1930).

Merchant Marine Act (46 U. S. C. A., Sec. 688).

Loe v. Goldstein, 101 Fed. (2d) 967, 971 (C. C. A. 9, 1939).

Federal Social Security Act (42 U. S. C. A., Sec. 1011b).

"It has been held by this and other courts that employment within the meaning of the statute connotes the legal relation

These authorities follow the settled rule of construction that statutory language which has a meaning sanctioned by judicial decision will be presumed to have been used in that sense.[47]

Resort to the meaning sanctioned by judicial decision is here the more imperative, since, as already pointed out, the word "employee" itself connotes a legal relationship and hence may be understood only by an examination of its legal background. The meaning of "interurban rail-

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ship of employer and employee as those terms were defined and understood at the time of the enactment

Williams v. United States, 126 Fed. (2d) 129, 132 (C. C. A. 7, 1942; cert. den. 317 U. S. 655);

Accord:

Radio City Music Hall Corp. v. United States, 135 Fed. (2d) 715 (C. C. A. 2, 1943);

Anglim v. Empire Star Mines, 129 Fed. (2d) 914, 916, 917 (C. C. A. 9, 1942);

United States v. Griswold, 124 Fed. (2d) 599, 601 (C. C. A. 1, 1941);

Deecy Products Co. v. Welch, 124 Fed. (2d) 592, 597 (C. C. A. 1, 1941);

Jones v. Goodson, 121 Fed. (2d) 176, 180 (C. C. A. 10, 1941);

Texas Co. v. Higgins, 118 Fed. (2d) 636 (C. C. A. 2, 1941).

[47] "It is a well-settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body."

Kepner v. United States, 195 U. S. 100, 124 (1904).

"The word 'bequest' having the judicially settled meaning which we have stated, we must presume it was used in this sense by Congress."

United States v. Merriam, 263 U. S. 179, 187 (1923).

Accord:

McDonald v. United States, 89 Fed. (2d) 128, 133 (C. C. A. 8, 1937; cert. den. 301 U. S. 697).

way"[48] or "bituminous coal"[49] or "control"[50] or "crew"[51] in a statute may perhaps be ascertained without resort to legal precedents. The meaning of "employee," however, can be accurately determined only by resort to the decisions of the courts. Therefore, when Congress used the word "employee" it must be deemed to have had in mind its judicially settled meaning. If Congress had used the word "contract," certainly it would not be supposed that it meant an unaccepted offer, and there would be resort to the law of contracts to ascertain what was included within the Congressional language. So here, there should be resort to the law of agency to ascertain what Congress meant by this unadorned use of the word "employee."

The opinion in *United States v. American Trucking Assns.*, 310 U. S. 534 (1940), does not repel this conclusion. There non-transportation workers were excluded from the purview of the word "employees" found in provisions of the Motor Carrier Act of 1935 dealing with "maximum hours of service." But they were so excluded for the reason that their inclusion would have been at variance with the Act's legislative history (p. 548), and a uniform Congressional scheme ("settled practice of Congress") to restrict hours of service for transportation workers *only*, evidenced in the case of workers under the Hours of Service Act, the Seamen's Act, and the Civil Aeronautics Authority (pp. 544, 545).

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[48] *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177 (1938).

[49] *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940).

[50] *Rochester Telephone Corp. v. United States*, 307 U. S. 125 (1939).

[51] *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251 (1940).

(4) Unless the Word "Employee" as Used in the Act be Given its Judicially Settled Meaning, the Act Is Unconstitutional.

The word "employee" in the Act is a *standard*[52] set by Congress to mark the limits of the Board's jurisdiction.

Unless this word be given its judicially settled meaning, it describes no definite concept. The *standard* then becomes so vague and indefinite as to amount to no standard at all. Lacking an ascertainable and definite standard, the Act would be unconstitutional.[53] Under the rule that an interpretation which would render a statute constitutional will be preferred to one which would render it un-

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[52]Illustrative of *"standards"* found in certain acts of Congress, are the following:

Under the Natural Gas Act of 1938 (15 U. S. C. A., Sec. 717) the words *"just and reasonable"* as applied to rates and charges in connection with the transportation or sale of natural gas, were referred to by Mr. Chief Justice Stone in *Federal Power Comm. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 586 (1942), as "the Congressional standard prescribed by this statute." Under the Federal Trade Commission Act (15 U. S. C. A., Sec. 45), the words *"unfair methods of competition* in commerce" provided "the legislative standard." *Humphrey's Executor v. United States*, 295 U. S. 602, 628 (1935). Under the Communications Act of 1934 (47 U. S. C. A., Sec. 307), Mr. Justice Frankfurter referred to the words "public convenience, interest, or necessity" as "the touchstone for the exercise of the Commission's authority." *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940). Under the Interstate Commerce Act (49 U. S. C. A., 20a), a standard found in the words "public interest" was found to be certain and adequate. *New York Central Securities Corp. v. United States*, 287 U. S. 12, 24, 25 (1932). Under the so-called "grandfather" clause of the Motor Carrier Act of 1935 (49 U. S. C. A., Sec. 306a); the words *"bona fide* operation" and "common carrier by motor vehicle" were held to be a "standard" for the guidance of the Interstate Commerce Commission. *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 480, 484, 489, 494 (1942).

[53]*Panama Refining Co. v. Ryan*, 293 U. S. 388, 420 (1935); *Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

constitutional,[54] any interpretation of the word "employee" departing from its judicially settled meaning must be discarded.

There is nothing in the "Findings and Policy" stated by Congress in Section 1[55] of the Act which supplies a definite standard for the administrative body, if "employee" be given a vague and indefinite meaning. That section throughout uses the words "employers" and "employees" without clarifying definition. Therefore, if these words be given a vague and indefinite meaning, Section 1 itself becomes vague and indefinite when attempt is made to ascertain therefrom the class of persons Congress intended should be dealt with by the Board.

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[54] *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909).

Knights Templars' Indemnity Co. v. Jarman, 187 U. S. 197, 205 (1902).

[55] "Section 1. The denial by *employers* of the right of *employees* to organize and the refusal by *employers* to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between *employees* who do not possess full freedom of association or actual liberty of contract, and *employers* who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the

(5) According to its Judicially Settled Meaning the Word "Employee" Connotes One Who Performs Services Under Conditions Which Give the One for Whom the Services Are Performed Power of Complete Control and Direction, Not Only as to the Result to be Attained, But Over the Details and Means by Which That Result Is Accomplished.

The existence or non-existence of an employer-employee relationship was and is commonly ascertained judicially by the so-called "control test": (a) that employment does not exist in the absence of a *power of control over the details and means of performance*;[36] and (b) that employment does not exist unless such "control" be a *complete control,*

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purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to *employees* to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between *employers* and *employees.*

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

[36] *Fidelity & Casualty Co. v. Industrial Acc. Comm.*, 191 Cal. 404, 407; 216 Pac. 578, 579 (1923).

Leukuhl v. Clark, 209 Minn. 276; 296 N. W. 28, 29 (1941).

as distinguished from "mere suggestion as to detail or necessary cooperation."[57]

This "control test" for determining the existence of an employee relationship has been employed for many years. It was employed in cases involving liability for a workman's negligence as early as 1851 in New York (*Blake v. Ferris*, 1 Selden [5 N. Y.] 48; 55 Am. Dec. 304) and as early as 1857 in California (*Boswell v. Laird*, 8 Cal. 469; 68 Am. Dec. 345). In England it was recognized as a test as early as 1840 (*Milligan v. Wedge*, 12 Adol. & El. 737; 113 Eng. Rep. 993) and adopted as a test as early as 1855 (*Sadler v. Henlock*, 4 El. & Bl. 570; 119 Eng. Rep. 209).

With the advent of workmen's compensation legislation this "control test" was uniformly adopted to mark the line

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[57] *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 811, 813; 159 Pac. 721, 723, 724 (1916).

As said in *Standard Oil Co. v. Anderson*, 212 U. S. 215, 222 (1909):

> "Here we must carefully distinguish between *authoritative direction and control*, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking. These principles are sustained by the great weight of authority . . ."

As said in *Winther v. Industrial Accident Comm.*, 16 Cal. App. (2d) 131, 136, 60 Pac. (2d) 342, 345 (1936):

> "Whether the control which an employer has the right to exercise over the manner in which the work is to be performed is best expressed through its modification by the word 'authoritative,' or by the word 'unqualified' or by the word 'complete,' it is clear from the decisions that *it must be a control which reaches into the details of performance* and reserves to the employer the right to direct the manner in which these details are to be carried out."

between employment and non-employment[58] despite the fact that these statutes rested upon a newly adopted theory of liability, *viz.*, that the financial cost of industrial accidents ought to be treated as a part of the expense of production.[59]

These workmen's compensation statutes and the application of the "control test" thereunder were well known to lawyers and legislators in 1935 when the National Labor Relations Act was being drafted and enacted. Therefore, it must be concluded that when Congress used the word "employee" in that Act without further enlightening definition, it intended it to describe the conventional employer-employee relationship as then understood and defined by the "control test."

It is significant that the "*control test*" was promptly adopted *by regulation* to define the term "employment" under the Social Security Act, which was enacted in the month following the enactment of the National Labor Relations Act. Thus, Regulations 91, Art. 3 under the Social Security Act adopted November 9, 1936, like present Regulations 106, Sec. 402.204, defining "employment,"

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[58] *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 Pac. 721, 723 (1916); *Kelley's Dependents v. Hoosac Lumber Co.*, 95 Vt. 50, 113 Atl. 818, 820 (1921); *Maltz v. Jackoway-Katz Cap Co.*, 336 Mo. 1000, 82 S. W. (2d) 909, 912 (1935); *Henry v. Mondillo*, 49 R. I. 261, 142 Atl. 230, 232 (1928); *Stricker v. Industrial Commission*, 55 Utah 603, 188 Pac. 849, 851 (1920); *Landberg v. State Industrial Acc. Commission*, 107 Ore. 498, 215 Pac. 594, 596 (1923); *W. T. Congleton Co. v. Bradley*, 259 Ky. 127, 81 S. W. (2d) 912, 913 (1935); *Hinds v. Department of Labor and Industries*, 150 Wash. 230, 272 Pac. 734, 735 (1928); *Pace v. Appanoose County*, 184 Iowa 498, 168 N. W. 916, 919 (1918).

[59] *New York Central R. Co. v. White*, 243 U. S. 188, 203 (1917); *Cudahy Packing Co. v. Parramore*, 263 U. S. 418, 423 (1923).

provided: "Generally such relationship exists when the person for whom services are performed has the *right to control and direct* the individual who performs the services, not only as to the result to be accomplished by the work but also *as to the details and means by which that result is accomplished.* That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done . . ."[60]

Certain cases decided under state workmen's compensation statutes[61] have considered the status of newsboys, and, applying the "control test," have held that they were not "employees" because not subject to the control requisite to establish such relationship. These cases are:

New York Indemnity Co. v. Industrial Accident Comm., 213 Cal. 43, 1 Pac. (2d) 12 (1931);

Birmingham Post Co. v. Sturgeon, 227 Ala. 162, 149 So. 74 (1933);

Creswell v. Charlotte News Pub. Co., 204 N. C. 380, 168 S. E. 408 (1933);

Bernat v. Star-Chronicle Pub. Co. (Mo. App.), 84 S. W. (2d) 429 (1935);

Balinski v. Press Pub. Co., 118 Pa. Sup. 89, 179 Atl. 897 (1935).

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[60]See *Indian Refining Co. v. Dallman*, 31 F. Supp. 455 (Ill. 1940, aff. 119 Fed. (2d) 417). In *Radio City Music Hall Corp. v. United States*, 135 Fed. (2d) 715, 717 (C. C. A. 2, 1943), Circuit Judge Learned Hand accepted this "as an authoritative definition of the distinction between an 'employee' and 'independent contractor'" but said that it was "really no more than a gloss upon the definition contained in Justice Gray's opinion in *Singer Manufacturing Co. v. Rahn*, 132 U. S. 518, 523 . . ." and that the "test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said, though the regulation redundantly elaborated it."

[61]These statutes defined "employee" in much the same inconclusive way as the Act here involved. See Appendix.

The facts upon which these decisions rest have been summarized in the Appendix to this brief.

A comparison of these facts with the facts presented in the instant case compels the conclusion that newsboys selling this respondent's newspaper were not "employees" in the judicially accepted sense.

(6) The Basic Findings of the Board Do Not Support the Conclusion That the Newsboys Were Employees of This Respondent.

In its decision and order of March 30, 1942, the Board's ultimate conclusion was "that the newsboys involved in this proceeding are *employees* within the meaning of Section 2(3) of the Act" [R. 472]. The Board was required to "state its findings of fact,"[62] and this ultimate conclusion standing alone would not have supported the order. Such order must rest upon a finding of *basic* facts.[63] However, it is indicated [R. 472] in the deci-

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[62] Section 10(c) of the Act provides that "if upon all the testimony . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board *shall state its findings of fact* . . ."

[63] *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506 (1935); *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 202 (1935). As said in *Saginaw Broadcasting Co. v. Fed. Communications Comm.*, 96 Fed. (2d) 554, 560 (App. D. C. 1938; cert. den. 305 U. S. 613), "findings of fact, to be sufficient to support an order, must include . . . *the basic facts*, from which the ultimate facts in the terms of the statutory criterion are inferred."

sion and order of March 30, 1942, that this ultimate conclusion is based upon findings made in the representation proceeding. Therefore, reference must be made to the decision of January 9, 1941 [R. 77 *et seq.*] in the representation proceeding to find the *basic findings* for the Board's ultimate conclusion that employment existed. These basic findings will be found under the heading [R. 88] "Status of the newsboys involved in this proceeding."

Before considering these basic findings, it is important to note that while four cases involving four different newspapers were "consolidated" for hearing before the Board's Trial Examiner [R. 14, 15], it was recognized in the proceedings before the Board that evidence applicable to one newspaper would not be considered as applicable to another newspaper. Thus, the Board stated in its decision and order of March 30, 1942, here under review: "In our present decision, as well as in the Board's decision in the representation proceeding hereinafter referred to, we have not considered evidence with respect to one publisher as applicable to any other publisher" [R. 456, footnote]. Thus, at the hearing in the representation proceeding where the entire evidence relating to newsboy status will be found [R. 523 *et seq.*], it was stipulated between counsel for the Board and this respondent that the testimony of numerous witnesses interrogated concerning practices involving newsboys selling the Times, Herald and News

would have no application to the case of this respondent (the Examiner).[64]

Counsel for this respondent, relying upon these stipulations, refrained from cross-examination of these witnesses. It is not assumed that the Board has any inclination, or, under these circumstances any right, to disavow the binding effect of these stipulations. The separate character of the four cases is recognized in the Board's orders here under review [R. 347 to 350 and 475 to 479], and was preserved by four separate petitions for review in the court below [R. 1699, 1738, 1764, 1806]. Four separate decrees of the court below [R. 1852, 1853, 1854] come before this Court as separate cases: Nos. 336, 337, 338 and 339.

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[64]Thus it was stipulated that the testimony of the following witnesses had no application to this respondent's case:

Gene LeRoy Alley [as to testimony commencing, R. 816] [R. 829]; James V. Apice [R. 1123]; Thomas Hilliard Ash [R. 1124]; Mike Barrett [R. 853]; Julius J. Cohen [R. 1177, 1178]; Max Robert Dyer [R. 1294]; Roy Eley [as to testimony commencing R. 1181] [R. 1211]; [as to testimony commencing R. 1308 and R. 1310] [R. 1310, 1312]; Sid Faber [R. 718]; Harry Thomas Gish [R. 743]; Gus Georgon [R. 1059, 1060, 1064]; William J. Harrison [as to testimony commencing R. 1030 with one exception] [R. 1053]; Geo. E. Hutchinson [R. 1147]; David Kadesh [R. 815]; Sam Kahn [R. 913]; Thomas McKinney [R. 1211]; Raymond F. Marx [R. 1177, 1178]; Isaiah Jacob Moore [R. 1129]; Sidney Glen Murray [R. 1116]; Maurice F. Nickerson [R. 1030]; Gordon Norton [as to testimony commencing at R. 1013] [R. 1024]; Dutton F. O'Brien [with certain exceptions] [R. 1088, 1089, 1131]; Edward Patch [R. 1328]; Harry Plotkin [as to testimony commencing at R. 986] [R. 997]; John A. Roberts [with certain exceptions] [R. 1242, 1243]; Edw. Victor Smith [R. 1113]; Frank Benjamin Smith [R. 1107]; Robert L. Smith [R. 1079; recalled, R. 1636, 1637]; Philip Spampinato [R. 847]; Charles C. Spillers [R. 895]; Arthur Steuart [R. 779]; Philip Joseph Tellis [R. 1248].

Therefore, in determining whether the Board's findings are supported by substantial evidence in this case No. 336, only a part of the evidence in the consolidated transcript of record before this Court may be considered.

The Board's basic findings fall into two categories: (A) those findings which, even if supported by substantial evidence, would not tend to show an employee status, and (B) those findings which, at least as to this respondent, are not supported by substantial evidence.[65]

(A) Certain Basic Findings of the Board Do Not Support the Board's Conclusion That Employment Existed, for Under the Settled Course of Judicial Decision Determining When Employment Arises Such Findings Even if Supported Would Not Tend to Show an Employee Status.

(Finding)

"The newsboy customarily obtains his corner or spot by making application at the plant of the publisher where he consults a district manager. The applicant usually inquires whether there is a corner or spot 'open.'" [R. 95.] *". . . district managers of the Companies allocate corners and spots . . ."* [R. 96.]

A wholesaler frequently consents to supply merchandise to a retailer on condition that the latter will con-

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[65]Unquestionably a finding of the Board will not be upheld unless supported by substantial evidence. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229 (1938). "Substantial" evidence means such evidence as would be sufficient to take the case to the jury in a trial by jury. *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299 (1939).

duct his retail sales solely within a certain territory. No employee status arises because such condition is imposed.

The territory here involved included streets and sidewalks. Respondent had no right or power to admit or exclude any newsboy from this public property and never attempted anything of the kind.

But respondent could say to a newsboy, "We will wholesale newspapers to you only so long as you resell them to the public at a certain location." This in substance was what occurred when newsboys were said to have been "placed" or "put" on corners or spots [R. 1381, 1382, 1436, 1438, 1525, 1527. See, also, Statement of the Case, *supra*, under heading "Newsboys' sales territory"]. If the above finding that corners were "*allocated*" means something more than this, then there was no evidence to support the finding.

Cases dealing with newsboy status have held that this circumstance (*i. e.*, limitation of territory) is no indication of an employee relationship.[66]

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[66]See the following cases more particularly referred to in the Appendix:

New York Indemnity Co. v. Industrial Accident Comm., 213 Cal. 43; 1 Pac. (2d) 12 (1931); *Birmingham Post Co. v. Sturgeon*, 227 Ala. 162, 149 So. 74 (1933); *Creswell v. Charlotte News Pub. Co.*, 204 N. C. 380; 168 S. E. 408 (1933); *Balinski v. Press Pub. Co.*, 118 Pa. Super. 89; 179 Atl. 897 (1935).

In *Matter of Federal Ice & Cold Storage Co.* and *Produce Drivers and Employees Union, Local No. 630*, 18 N.L.R.B. 161, 164, certain drivers of ice trucks were required to confine their operations to fixed territories and the Company refused to sell to drivers who failed to abide by this requirement. The Board, in finding that these drivers were *not* employees, declared that this is a "restriction . . . commonly placed on independent dealers by distributors . . ."

(Finding)

"The record is replete with instances in which district managers have removed, permanently or temporarily, newsboys from their corners or transferred them from one location to another, for various reasons." [R. 100.]

A wholesaler must and will on occasion refuse to supply his product to a retailer whose conduct or activities or credit delinquencies threaten detriment to the wholesaler or his product if relations be continued. The fact that a wholesaler does this, or the possibility that he may do this, does not change the relationship between the wholesaler and retailer to one of employer and employee.

This was the only way in which "removal" of newsboys could be accomplished. Obviously a district manager could not have physically removed a newsboy from a public street any more than he could have closed a corner drug store or cigar store to which wholesale deliveries of the newspaper were discontinued.

In *Texas Co. v. Higgins*, 118 Fed. (2d) 636 (C. C. A. 2, 1941) the question presented was whether a distributor (Thomas) for a large oil company (Texas Company) was its "employee" under the Social Security Act. The oil company had the right to terminate the relationship on five days' notice and thereupon buy the distributor's plant at cost. It was contended (p. 638) that this gave the company "absolute power over the business, because by this sanction it could not only intervene when and as it chose, but could direct the details of every move made."

The Court refused to adopt this contention and held that no employee relationship existed.[67]

Cases dealing with newsboy status have held that this circumstance (right to discontinue wholesale deliveries) is no indication of an employee relationship.[68]

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[67]Disposing of this contention, Circuit Judge Learned Hand said (p. 638):

> "The character of the relation was determined by the rights and obligations assumed, and it is no answer that the plaintiff could force a change in these by threatening to terminate the agency. Assuming that Thomas would inevitably have complied with invasions of his rights secured by the contract—which is by no means certain and would obviously depend upon how burdensome these were—legally, the effect would be to force upon him *pro tanto* a new agreement. The plaintiff's power to end the agency was merely a power to free itself from all obligations; it was not a legal power to compel Thomas to assent to new proposals, and it might, or might not, be effective for that purpose. While the agency lasted the plaintiff had no control at all save that reserved, and Thomas was merely a factor receiving goods on consignment, and a factor is not an 'employee' but an 'independent contractor.'"

[68]In *New York Indemnity Co. v. Industrial Accident Comm.*, 213 Cal. 43; 1 Pac. (2d) 12; 14 (1931), each newsboy was "required to be active and vigilant in making sales . . . . Otherwise his . . . . corner would be given to another newsboy . . . ." In *Birmingham Post Co. v. Sturgeon*, 227 Ala. 162; 149 So. 74, 75 (1933), if the newsboy failed to call for his first assignment of papers, another newsboy was assigned to his corner. In *Creswell v. Charlotte News Pub. Co.*, 204 N. C. 380; 168 S. E. 408, 409 (1933), if the newsboys did not stay on the beat assigned or were not active in their efforts to sell papers, "they lost their jobs." In *Bernat v. Star-Chronicle Pub. Co.*, ... Mo. App. ....; 84 S. W. (2d) 429, 431 (1935), if the newsboy failed to conduct his activities "to the entire satisfaction of the companies" then the latter could discontinue supplying him with papers. In *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89; 179 Atl. 897, 898 (1935), if the newsboy was habitually late at his corner, or sold on a corner assigned to another newsboy, or sold in front of drug stores selling the newspaper, or sold in excess of the fixed retail price, or sold the

(Finding)

"Generally the newsboy is required to be at his post from the time the newspapers customarily appear on the street to the time settlement is made." [R. 98.][69]

When the newspaper appeared, quantities thereof were carried around and dumped at various corners. Know-

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competing newspaper, or "failed to sell a sufficient number of newspapers," he was refused further newspapers.

Yet in none of these cases were these circumstances held to indicate an employee relationship.

Exercise of the right to discontinue dealing with a particular retail vendor was held not to be indicative of employer-employee status in *Matter of Houston Chronicle Publishing Company and Houston Newsboys Union, Local 456*, 28 N.L.R.B. 1043, 1046.

The fact that a newspaper, in its relations with a carrier, reserved the right to terminate such relations in the event the carrier's delivery service became inefficient, was held *not* to make such relationship one of employment. *Bohanon v. James McClatchy Pub. Co.*, 16 Cal. App. (2d) 188, 60 Pac. (2d) 510 (1936); *Batt v. San Diego Sun Pub. Co., Ltd.*, 21 Cal. App. (2d) 429, 69 Pac. (2d) 216 (1937); *Rathbun v. Payne*, 21 Cal. App. (2d) 49, 68 Pac. (2d) 291 (1937); *Gall v. Detroit Journal Co.*, 191 Mich. 405, 158 N. W. 8 (1916); see, also *Chicago, R. I. & Pacif. Ry. Co. v. Bond*, 240 U. S. 449, 455, 60 L. Ed. 735, 738 (1916).

In *Meredith Pub. Co. v. Iowa Employment Security Comm.*, ... Iowa ....., 6 N. W. (2d) 6 (1942), the contract of a magazine subscription solicitor could be "terminated by either party at any time without assigning any cause or giving any prior written notice." It was held, nevertheless, that such solicitor was not an employee under the Iowa Employment Security Law. Accord: *Nelson Bros. & Co. v. Industrial Comm.*, 330 Ill. 27; 161 N. E. 113, 114 (1928).

[69]In a footnote to this finding the Board states: "When the publisher plans to issue an 'extra,' district managers notify the newsboys who are expected to attend their locations on such occasions either before or after the usual selling period." [R. 98, footnote.] There was no evidence that this was a practice followed by this respondent.

ing in advance[70] the hour when the papers they were buying would be ready for delivery and the spot at which delivery would be made, the newsboys were under an incentive to be there at that hour. The newspapers had a fleeting sales value. If they were to be sold at all, they had to be sold during a limited period. The newsboys must have realized the necessity of obtaining their merchandise as soon as it was available and disposing of it while it was saleable. No orders from the district men were necessary to enforce what the self interest of the newsboys dictated. Mr. Hampson, respondent's P. M. street sales manager, who had "worked every district . . . within the city" [R. 1572], testified that he had never given the district men any instructions "in regards to time that a newsboy must be on the corner." [R. 1569.]

Any independent retailer, if he is to continue relations with a wholesaler, of necessity must be diligent to receive and care for the merchandise delivered to him for resale. The fact that district men on occasion told newsboys when they might expect delivery of papers, or even the fact that the newsboys were expected at a certain hour to receive their papers, does not indicate control over the means or methods employed by the newsboys in their operations, or point to an employee relationship.

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[70]If the newsboys inquired about the delivery hour, they would be told [R. 929]. Frequently they needed no such advice. Thus Mr. Seebolt, in charge of respondent's morning downtown street sales, testified that he did not instruct newsboys that they "must show up at a given spot to receive their papers at a given time" [R. 1394, 1395] and he added that the newsboys knew "just the same as I know, when to come down" [R. 1397].

As already pointed out, the newsboys generally quit work when they felt like quitting (see footnotes 21 and 22 herein).

Cases dealing with newsboy status have held that these circumstances are no indication of an employee relationship.[71]

(Finding)

"'. . . *the newsboys are permitted by each of the Companies to return all unsold copies and receive credit for them.*" [R. 91.]

An independent dealer frequently, at the request of a wholesaler, takes quantities of a product which he subsequently is unable to retail and which he is permitted to return to the wholesaler for credit. This is a common practice at drug stores and cigar stores handling magazines.

Cases dealing with newsboy status have held that this circumstance (*i. e.*, privilege of returning unsold newspapers) is no indication of an employee relationship.[72]

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[71]In *Birmingham Post Co. v. Sturgeon:* 227 Ala. 162; 149 So. 74 (1933), the newsboy was required to be at his corner at a stated time to receive his papers. In *Bernat v. Star-Chronicle Pub. Co.*, ... Mo. App. ....; 84 S. W. (2d) 429 (1935), the newsboy was required to go to the railroad depot at a stated time to receive his papers. In *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89; 179 Atl. 897 (1935), the newsboy was required to report at his corner as soon after school as possible, and if he were habitually late he was refused further papers.

Yet in none of these cases were these circumstances held to indicate an employee relationship.

[72]See the following cases more particularly referred to in the Appendix: *New York Indemnity Co. v. Industrial Accident Comm.*, 213 Cal. 43; 1 Pac. (2d) 12 (1931); *Birmingham Post Co. v. Sturgeon*, 227 Ala. 162; 149 So. 74 (1933); *Creswell v. Charlotte News Pub. Co.*, 204 N. C. 380; 168 S. E. 408 (1933); *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89; 179 Atl. 897 (1935).

The Board has recognized that the return of unsold newspapers is not a factor indicative of an employer-employee relation. See *Matter of Houston Chronicle Publishing Company and Houston Newsboys Union, Local 456*, 28 N.L.R.B. 1043, 1045.

(Finding)

"The Companies furnish boxes, racks, change aprons, and placards advertising special features contained in the newspapers, bearing the name of the publisher. To facilitate the work of the newsboy and to increase circulation . . . the district managers distribute such equipment and advertising material to the newsboys with instructions to keep the newspapers in the boxes or the racks and to display the advertising matter on posts, fire plugs, or other vantage points." [R. 97, 98.]

There is no evidence connecting this respondent with the distribution of "boxes" or "racks." As to this respondent, that part of the above finding relating to "boxes" or "racks" is unsupported by substantial or any evidence.[73]

Nor does any substantial evidence warrant the finding that this respondent's district managers made it a practice to instruct the newsboys that they *must* display advertising matter. Newsboys Sanchez, Nation and Nixon testified that district man Pierce told them on a very few occasions to see that placards were displayed [R. 1485, 1486, 1586, 1607]. This was the only evidence indicating that any one connected with this respondent ever gave such instructions. This testimony was positively denied by district man Pierce [R. 1537, 1547]. These few isolated instances, narrated by three out of some 453 newsboys [R. 238] concerning one out of not less than 16 district men [R. 1364, 1373], cannot be said to be sub-

[73]Mr. Seebolt, in charge of respondent's morning downtown street sales, testified that during two years prior to the hearing he had not handled or put out any news racks or put out any boxes [R. 1391]. This testimony was not contradicted.

stantial evidence to support a finding that respondent's district men as a matter of practice gave instructions of this character.

The distribution of advertising matter designed to facilitate sales does not point to an employee relationship. It is quite as characteristic of an independent-dealer status as it is of employee status. Many retail stores contain a variety of devices for pictorial display and utility furnished by a manufacturer and advertising the latter's products, although no employment relationship exists between the manufacturer and the storekeeper.

Cases dealing with newsboy status have held that this circumstance (furnishing of advertising paraphernalia) is no indication of an employee relationship.[74]

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[74]In *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89; 179 Atl. 897 (1935), the newsboys were furnished with money bags bearing the name of the newspaper as well as "shoulder straps" with which to display the papers. This circumstance was held to be no indication of an employee relationship. In *Gall v. Detroit Journal Co.*, 191 Mich. 405; 158 N. W. 36 (1916), a newspaper carrier used his own automobile, but the newspaper's name was painted thereon. Despite this fact and the fact that the newspaper could terminate relations with him at any time, he was held to be an independent contractor.

In *Matter of Federal Ice & Cold Storage Co. v. Produce Drivers and Employees Union, Local No. 630*, 18 N.L.R.B. 161, the company painted its name on ice trucks operated by certain drivers. In finding that these drivers were *not* employees, the Board said: "We are of the opinion that these services amount to no more than aid furnished by a distributor to independent dealers . . ."

(B) THE REMAINING BASIC FINDINGS OF THE BOARD DO NOT SUPPORT THE BOARD'S CONCLUSION THAT THE NEWSBOYS WERE EMPLOYEES OF THIS RESPONDENT, FOR THERE WAS NO SUBSTANTIAL EVIDENCE SHOWING THAT SUCH FINDINGS WERE TRUE AS TO THIS RESPONDENT.

(Finding)

"Checkman" sometimes referred to as "main spot boys," receive a "small salary from the publisher" and are "carried on the publisher's payroll." [R. 90.]

This respondent did not have checkmen. It did not have on its payroll or pay money to any "checkmen," whether so described or described as "main spot boys." [R. 1557.]

(Finding)

". . . *in practice the newsboys cannot determine the size of their respective order without the co-operation of the district manager.*" [R. 92.] ". . . *the newsboy often has no voice in the determination of the established order.*" [R. 93.]

So far as this respondent is concerned, this finding is unsupported by substantial evidence. In this connection the Board points [R. 94] to the testimony of three newsboys:[75] Sanchez, Nixon and Buhl. Certainly there is no other evidence even remotely touching this.

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[75]All the other testimony adverted to by the Board relates to some other newspaper.

Newsboy Sanchez testified that on many occasions [R. 1485] his district man gave him more copies of the midnight edition than he wanted, but that he was permitted to return these the following day [R. 1485, 1491], receiving full credit therefor [R. 1491].

Newsboy Nixon testified that he did not determine the number of papers that he received; that his district man determined this [R. 1606] but when asked if he ever complained to his district man "about not getting enough newspapers," he replied, "No, sir; I never have a solitary time." [R. 1609.]

Newsboy Buhl testified that his district man determined the number of papers that he should receive [R. 1624]; but when asked if he ever asked the district man for more papers than he was given, he replied: "I have never asked him, no." [R. 1624.]

There was no evidence applicable to this respondent that the newsboys ever received *less* papers than they asked for, or, if they received *more* papers than they asked for, that they were not permitted to return and receive credit for all unsold copies.

Mr. Seebolt, in charge of respondent's morning downtown street sales, testified that if a newsboy requested more papers than were handed him, such request was "as a matter of practice" complied with [R. 1393].

(Finding)

The district men "issue detailed directions as to specific places within the newsboy's allotted territory in which to engage in selling activities, particularly with reference to standing in street traffic and covering business establishments where large numbers of people congregate." [R. 96.]

There was no substantial evidence supporting this finding in so far as this respondent's district men were concerned. The Board in this connection points [R. 97] to the testimony of one newsboy,[76] Latham, that *on one occasion* respondent's district manager told Latham to "watch" his corner, and to "work" a nearby market, and to "work the white [traffic] lines," and that *on another occasion* Latham was told by his district man "to instruct an off-spot boy . . . to work in the safety zone." The latter reference is an incorrect summary of Latham's testimony, for Latham did not testify that his district man told him *to give any instructions* to an off-spot boy [R. 1464]. But quite apart from this, evidence of two conversations between one newsboy and one district man [R. 1443, 1444, 1445], is not substantial evidence from which to infer a practice, which, if it existed at all, must have affected not less than 16 district men [R. 1364, 1373] and not less than 453 news-

[76] All the other testimony adverted to by the Board relates to some other newspaper.

boys [R. 238].[77] A finding may not be based on "an inference drawn from tenuous circumstances that at best could have supported only an anemic suspicion."[78]

(Finding)

"The Companies dealt with union representatives with respect to . . . . grievances." [R. 108.]

If this implies that this respondent ever dealt with the union as a representative of respondent's employees, then there was no evidence to support this finding.

At meetings at which this respondent's business manager was present [R. 668], it was stated to union representatives that the newspapers would not consider the negotiation of a contract with the union until it should be decided that the newsboys were employees [R. 672, 679, 680].

(Finding)

"The record also contains evidence with respect to the extent of the Companies' supervision over the conduct of the newsboys while they are engaged in selling newspapers on the street." [R. 103.]

As to this respondent this finding is unsupported by substantial evidence.

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[77]A search of the record for testimony, other than these two conversations, which might conceivably provide support for this finding yields nothing. On one occasion newsboy Deering and district manager Pierce debated whether Deering could sell more papers by standing against a building or away from the building [R. 1497], but this was obviously nothing more than advice as to how more papers might be sold.

[78]*National Labor Relations Board v. Sheboygan Chair Co.*, 125 Fed (2d) 436, 439 (C. C. A. 7, 1942).

First, attention is invited to the testimony referred to by the Board to connect this respondent[79] with such "supervision."

(a) Testimony of Darrell Cole [R. 104].

Three [R. 1450] traveling circulation representatives traveled at intervals throughout the metropolitan area. Of these men, Cole, referred to in the findings, was the only one who testified [R. 1445, *et seq.*]. He has sometimes been referred to as a "checker" [R. 1446]. He traveled a district for several days consecutively, with months between each such "check-up" [R. 1451], to see that the territory was "covered," not only by newsboys, *but by other retailers, e. g., newsstand and drug stores* [R. 1446, 1450]. Mr. Hampson, who received Cole's reports, testified that he was "mainly interested in locations for new outlets" [R. 1570]. There was no evidence that Cole noted or reported the *conduct* of the newsboys while they were selling. There was no evidence that he ever spoke to any of the newsboys. Cole testified that he would simply "observe"; that he never gave orders or instructions to newsboys [R. 1452]; and that he was "never very interested" in the morning newsboys [R. 1450]. None of the newsboys called as witnesses tes-

[79] All other testimony referred to by the Board to support this broad finding relates to some other newspaper.

tified that Cole or any other traveling representative or "checker" ever spoke to them."[80]

Certainly it is a common practice where an independent dealer relationship exists for the manufacturer to send representatives into its distribution territory for the purpose of observing the efficiency or lack of efficiency of independent dealers in conducting retail sales. Such information is essential to the manufacturer in determining whether relationship with retail dealers shall be continued. This practice is no indication of the existence of an employee relationship.

(b) Testimony of newsboy Latham that district manager Jackson told him (Latham) to "get out . . . and sell" his papers: to "get a sandwich and stay outside on the corner" [R. 105].

This testimony does not support this finding of "supervision." It is not corroborated by Jackson's testimony [R. 1442 *et seq.*], although this circumstance is not noted in the findings. Moreover, Latham admitted that he never sold this respondent's newspaper after July, 1939 [R. 1470], so that his narrative, even if credited at its face value, dealt with matters too remote in point of time to have any relevancy.

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[80]There was no evidence whatever supporting the Board's finding in connection with its reference to the Cole testimony that the "supervisor or the investigator transmits the complaints to the district manager who brings the matter to the attention of the offending newsboy with the view of remedying the situation in the future." So far as this respondent is concerned, this is pure speculation and conjecture, even though the Hampson testimony [R. 1570, 1571] be disregarded, as was done by the Board [R. 104, footnote].

Second, a search of the entire record will disclose only the following additional matters (some of which have been referred to previously) which might have a bearing on the contention that there was "supervision" over the conduct of the newsboys while they were selling respondent's newspaper.

(a) Newsboy Seklemian testified that he was told by district manager Volanty "to keep selling—keep pushing" [R. 1405, 1406], and when Seklemian's sales did not seem to be going well, Volanty told Seklemian that the latter was putting him (Volanty) "behind the eight ball," and that if he did not watch his step, he (Volanty) would have Seklemian "behind the eight ball" [R. 1407]. Volanty later said, "I bring your papers; you buy them off me; you sell them . . . Don't forget . . . I am still your boss" [R. 1408, 1409]. On another occasion Volanty told Seklemian that one of Seklemian's regular customers [R. 1419, 1420] had complained that Seklemian was wearing a Bridges button and a C.I.O. button, and asked Seklemian why he didn't hide those buttons [R. 1410, 1411]. The foregoing conversations were denied by Volanty [R. 1515, 1516, 1517, 1518].

(b) Newsboy Deering testified that district manager Pierce told him to "stand away from the building" (Pacific Electric Building) and out on the sidewalk when he (Deering) was selling his papers [R. 1497]. But Deering had *not* been an Examiner newsboy for more than a year prior to the hearing [R. 1626].

(c) Newsboy Latham testified that district manager Jackson told him (Latham) to "work the market around there and watch the corner (Florence and Figueroa), and also work the white line" [R. 1458]; that on another occasion Jackson said that Latham "should build it (Washington and Figueroa) up to a good corner: if I kept myself neat and clean, I should be able to build it up to a good corner" [R. 1459]; that on another occasion Jackson told him (Latham) "to watch the Times guy and to be on my toes"; that if Latham didn't do this the "Times guy" would run ahead of him and sell papers, and that Latham "should work the white lines" [R. 1460]. Jackson testified that he did not recall these conversations [R. 1443, 1444, 1445]. But, as already noted, Latham had not been an Examiner newsboy since July, 1939 [R. 1470, 1471], *i. e.*, for over a year prior to the hearing.

(d) Newsboy Sanchez testified that he was told by district manager Pierce in September, 1938 (nearly two years before the hearing) when the national convenion of the American Legion was held in Los Angeles [R. 1371, 1372], to see that certain special American Legion supplements were put inside newspapers offered for sale [R. 1481, 1482]; and that on another occasion Pierce reprimanded him for being away from his corner [R. 1484, 1485]. All of the foregoing was denied by Pierce [R. 1535, 1536]. Moreover, Sanchez had not been an Examiner newsboy since October, 1939 [R. 1489], *i. e.*, for more than eight months prior to the hearing.

A finding that the conduct of newsboys was "supervised" may not be supported by inferences drawn from these isolated instances of interference by district men, generally denied by the latter. Most of these instances were remote in point of time and it is certain that they involved a very few newsboys.[81] Such testimony does not support an inference that similar acts of alleged supervision were generally practiced by district men in their dealings with the hundreds of newsboys vending this respondent's newspaper. No one in authority in respondent's business is shown to have authorized or ratified such alleged supervision, or indeed, to have had knowledge thereof.

But even if we adopt the unwarranted assumption that these few instances typify practices generally pursued by all district men at the present time, and disregard all testimony to the contrary, they do not support a finding that a relationship of employer and employee existed. They are not indicative of *complete* control by this re-

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[81]*Only ten newsboys were called to testify concerning newsboy operations in that part of these proceedings relating to this petitioner,* viz., Messrs. Seklemian [R. 1403]; Nixon [R. 1601], Johnson [R. 1614], Buhl [R. 1620], Barrett [R. 1423], Latham [R. 1453], Sanchez [R. 1477], Deering [R. 1494, 1624], Siegel [R. 1627] and Nation [R. 1585]. Only the first four were selling petitioner's newspaper at the time of the hearing. The other six had previously stopped selling the Los Angeles Examiner, and were therefore not qualified to testify and did not testify to matters indicative of petitioner's then current methods of operation. Barrett had not sold Examiners for three months [R. 1426]; Latham since July, 1939 [R. 1470, 1471]; Sanchez since October, 1939 [R. 1489]; Deering since June, 1939 [R. 1626]; Siegel had been a *Times* newsboy for six weeks [R. 1628]; and the same was true of Nation. [R. 1585, 1591].

spondent over the means and methods by which the work of the newsboys was performed. At most they amount to nothing more than "mere suggestion as to details . . . necessary cooperation." *Standard Oil Co. v. Anderson*, 212 U. S. 215, 222 (1909). Cases dealing with newsboy status make this clear.[82]

The record here shows no such power of control in this respondent as is requisite to establish an employer-employee relationship. Respondent had no power of control over the *details and means* by which the newsboys sold their papers. Moreover it would have been impracticable for respondent to have exercised anything approaching *complete* control over the selling activities of these numerous workers operating, not on respondent's property, but at widely scattered points on city streets over a wide area.

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[82]In *New York Indemnity Co. v. Industrial Accident Comm.*, 213 Cal. 43; 1 Pac. (2d) 12, 14 (1931), the district manager testified that one of his duties "was to maintain a status of peace and harmony among newsboys, and to so far supervise their daily conduct in the territory . . . as to promote the sale of the largest possible number of . . . newspapers . . ." In *Creswell v. Charlotte News Pub. Co.*, 204 N. C. 380; 168 S. E. 408, 409 (1933), the company's supervisor told the newsboy what the headlines were "and checked up the boys in order to ascertain if they were on the job or needed additional papers." In *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89; 179 Atl. 897, 898 (1935), the company's supervisor occasionally told the newsboys "how to hold the papers, and urged them to cry out the sale." The supervisor also made periodical inspection trips, and if he was of the opinion that a given newsboy was not making good, he informed the company's general manager, and if the latter was satisfied, the corner was taken away from the newsboy. A like result ensued if the newsboy sold the competing paper. In none of these cases were any of these circumstances held to be an indication of an employee relationship.

II.

The Bargaining Unit Designated by the Board Was Not an "Appropriate" Unit.[83]

(1) Unless the Unit Designated by the Board Was "Appropriate" for Collective Bargaining, Respondent Could Not Have Been Guilty of an "Unfair Labor Practice."

A finding as to the "appropriate" unit was indispensable. The "unfair labor practice" here alleged was respondent's failure to bargain collectively with a representative of the newsboys. The Act makes refusal "to bargain collectively with . . . representatives" of employees an unfair labor practice. But such representatives must have been designated or selected by "the majority of the employees in a unit appropriate for such purposes."[84] Thus the Board, in order to find that such

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[83]This point was raised in the court below [R. 1714, 1717], but was not passed upon. It was raised repeatedly in proceedings before the Board [R. 499, 153, 216, 217, 218, 370, 418, 419, 421, 422, 435, 436, 439, 440, 441].

[84]The pertinent provisions of the Act are:

"Sec. 8. It shall be an unfair labor practice for an employer—

* * * * * * * * * *

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."

"Sec. 9 (a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

"(b) The Board shall decide in each case whether in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

unfair labor practice has occurred, must determine that there has been a failure to bargain with "representatives," and in order to find that representatives have been lawfully designated or selected, the Board must determine the appropriateness of the unit by which they have been designed or selected. *Pittsburgh Plate Glass Co. v. National Labor Relations Board,* 313 U. S. 146, 152, 154 (1941).

(2) The Board's Designation of a Bargaining Unit Was Not Supported by Findings Showing It to Be an Appropriate Unit.

The Board's decision and direction of elections of January 9, 1941 [R. 77] found the following unit to be appropriate as to this respondent [R. 112]:

> ". . . all newsboys engaged in the street sale of the Examiner at established spots 4 or more hours a day, 5 or more days a week, within Los Angeles, California, except temporary newsboys"

and the terms "established spot" and "temporary newsboy" were defined as follows [R. 113, 114]:

> ". . . the term 'established spot' . . . refers to a place where a newsboy has engaged in the street sale of the . . . Examiner . . . 5 or more days a week for a period of 6 consecutive months or more, and the term 'temporary' newsboy . . . includes a newsboy who has engaged in the

street sale of the . . . Examiner . . . at an established spot for 30 days or less."[85]

Newsboys who did not fall within this definition of "appropriate unit" were, of course, excluded from the election conducted on May 15, 1941.[86]

On what basis were certain newsboys included and certain others excluded[87] from the "unit" found to be "appro-

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[85]The decision and order of March 30, 1942, here under review, sets forth the definition of appropriate unit without defining what is meant by the terms "established spots" and "temporary newsboys" [R. 463]. However, since this decision and order adopts and reaffirms without modification the definition of appropriate unit found in the decision and direction of elections of January 9, 1941 [R. 112], there can be no doubt that these terms are to be understood as defined in such decision and direction of elections [R. 113, 114].

[86]See certification of representatives, dated October 20, 1941, in which it is declared that as a result of the election the Union has been designated and selected by a majority of all newsboys engaged in the street sale of the Examiner, at established spots 4 or more hours a day, 5 or more days a week, within Los Angeles, California, excluding temporary newsboys, as their representative for the purposes of collective bargaining [R. 239]. It will also appear that at such election 161 newsboys voted for the Union out of a total of 321 actually voting and out of 453 declared to be eligible to vote [R. 238].

[87]It affirmatively appears, without contradiction, that there were newsboys not included in the "unit" found to be appropriate. Thus an election was held subsequent to the representation proceedings. Of the votes not counted because of challenges, 32 were not counted on the following grounds: that these newsboys "were not within the unit described in the Board's Order" [R. 202], or "were not engaged in selling 4 or more hours a day," [R. 204] or had "secured their newspapers from motor wholesalers . . . said transaction involving a sales activity which introduces elements making questionable the possibilities of full requirement with the Board's order" [R. 204, 205], or that their "sales locations" were "not within the district described in the Board's order" [R. 205], or that they were "relief men" [R. 206], or "did not spend sufficient time in selling" [R. 206], or that they "were not engaged in selling within the official limits of the City of Los Angeles" [R. 206].

priate"? What are the Board's findings which are assumed to support this line of demarcation?

Under Sec. 10(c) of the Act the Board was required to "state its findings of fact."

When a statute requires an administrative body to make findings, a failure to do so will invalidate its order.[88] If the findings made are inadequate to support the administrative conclusion, an order resting thereon will not be upheld. Moreover, findings which the administrative body might have made but did not make may not be availed of to support its order.[89]

In the complaint proceedings in our case [R. 455 *et seq.*] the Board made no findings showing why the unit so designated was an appropriate unit. The Board merely referred to its earlier order in the representation proceeding [R. 463, 464]. Turning to the latter [R. 76 *et seq.*] and to that part of the order which designates the appropriate unit [R. 112 *et seq.*] the findings stated in connection with this unit designation may be summarized as follows:

(a) That "the Union desires to exclude bootjackers, temporary, and part-time newsboys since they consist

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[88] *City of Yonkers v. United States*, ... U. S. .....; 12 Law Week 4104 (Jan. 3, 1944); *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 197 (1941); *United States v. Chicago, M., St. P. & R. Co.*, 294 U. S. 499, 506 (1935); *Atchison, T. & S. F. R. Co. v. United States*, 295 U. S. 193, 202 (1935); *Wichita R. R. & Light Co. v. Pub. Utilities Comm.*, 260 U. S. 48, 58, 59 (1922).

[89] *Securities and Exch. Comm. v. Chenery Corp.*, 318 U. S. 80, 94 (1943).

largely of schoolboys who do not depend upon the vending of newspapers for a livelihood and because of the irregularity of their employment" [R. 114, 115], and

(b) That the Union desires to exclude suburban newsboys, except Times newsboys in Glendale, because the Union's "organization has not as yet been extended to the suburban group" [R. 115], and

(c) That those whom the Union desires to be *included* "are, in general, mature individuals who daily rely upon their earnings from the street vending of newspapers as their source of support" [R. 115], and

(d) That the Union is the only labor organization existing among the newsboys and its organization has not yet extended to suburban newsboys other than Times newsboys in Glendale [R. 115], and

(e) That the designated unit will insure to employees the full benefit of their right to self-organization and collective bargaining and otherwise effectuate the policies of the Act [R. 116].

Finding (e) above is not the kind of finding which will support an exercise of discretion by the Board. In *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177 (1941), the Board had directed that the company employ workmen discriminated against who had obtained substantially equivalent employment, stating that this was "affirmative action designated to effectuate the policies of the Act" (19 N. L. R. B. 547, 598). Despite this general finding, the cause was remanded because the Board

had failed to find the facts upon which its order was predicated.

Finding (a) above is merely a recitation of what the Union desires and the Union's reason for that desire. It is not a finding of fact that excluded newsboys were largely schoolboys.[90]

Finding (c) above does no more than state that the Union "desires" that there be included in the unit mature individuals who make their living from newspaper sales. *It is not a finding that the unit designation adopted by the Board will bring about this result. It is not a finding that this unit designation will in fact include or tend to include such mature individuals. It is not a finding, and there is no finding, that this unit designation will include or tend to include all of such mature individuals, or that a number of these mature individuals will not be excluded from the unit.*

Thus the unit designation may not be rationalized and supported on the ground that it includes *all* mature individuals who make their living from newspaper sales, and

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[90]If this were to be taken as a finding of fact, it would be a finding unsupported by substantial evidence in so far as this respondent is concerned. There was no testimony that there were any schoolboys selling respondent's newspaper. The only testimony was to the contrary. Night district men Navarro and Volanty testified they had no "schoolboys" in their districts [R. 1438, 1525]. Night district man Jackson testified to the same effect [R. 1442]. Mr. Seebolt, in charge of morning downtown street sales, testified that there were no school boys selling in his district [R. 1380].

excludes *only* individuals in a different category, *for there are no findings which state this to be the fact.*[91]

Findings (b) and (d) above are to the effect that the Union is the only labor organization existing among the newsboys and that its organization has not been extended to suburban newsboys (except Times newsboys in Glendale). It is assumed that these findings are stated in the hope that they will support that distinction in the unit designation which *includes* city newsboys and *excludes* suburban newsboys. At least there are no other findings which by possibility would support this distinction. There are no findings that newsboys within and newsboys with-

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[91]Even if there had been such findings, the unit definition itself would nullify any attempt to rationalize the unit on this ground. This unit definition, if made operative, would certainly not result in including all mature professional news vendors and excluding only individuals of a different type. *Mature professional news vendors would be both included and excluded.* Thus a mature individual relying on his newspaper sales for a livelihood will be *outside* the unit, even though he sells for 4 or more hours a day, 5 or more days a week:

(a) If he takes a location where the previous newsboy had been selling only 4 days a week (for such location would not be an "established spot");

(b) If he takes a location where the previous newsboy had been selling 5 or more days a week, but doing so for less than 6 consecutive months (for such location would not be an "established spot");

(c) If he takes a location where the previous newsboy had not been selling the Los Angeles Examiner (for such location would not be an "established spot");

(d) If he takes a location outside the city boundary.

out the city boundaries [see R. 186, Exhibit "B"] differ in age or hours of work or methods of operation.[92]

It is submitted that a unit may not be justified *solely* on the basis of a union's desire *that the unit area be confined to the area the union has succeeded in organizing.* Under Sec. 9(b) of the Act (see footnote 84) the Board may select an "employer unit, craft unit, plant unit, or subdivision thereof." This is the limit of the Board's authority. (*Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146, 165.) A unit whose boundaries are fixed *solely* because they coincide with the area a union has succeeded in organizing is not framed in accordance with the dictates of this statutory limitation.

None of the Board's findings in connection with the designation of a unit support such designation. Factors commonly relied upon in designating units have been ignored.[93] No facts are found which show any reason-

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[92]Mr. Hampson, in charge of night street sales, testified that a part of the territory of the night district men was outside of the city limits [R. 1365]. Of course newspapers were sold by such district men to newsboys outside those limits in the same manner as to newsboys within the city.

[93]These factors are adverted to in *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U. S. 146, 153 (1941):

> "(1) the history, extent, and type of organization of the employees; (2) the history of their collective bargaining, including any contracts; (3) the history, extent, and type of organization, and the collective bargaining, of employees of other employers in the same industry; (4) the relationship between any proposed unit or units and the employer's organization, management, and operation of his business, including the geographical location of the various plants or parts of the system; and (5) the skill, wages, working conditions, and work of the employees."

able or logical basis for the distinction between newsboys included in and newsboys excluded from the unit. The Board has failed to disclose a legal basis for its order. (*Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 197.)

In conclusion, it is respectfully submitted that the decree of the Circuit Court of Appeals [R. 1852, 1853] should be affirmed.

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January 18, 1944.

APPENDIX.

DECISIONS OF STATE COURTS HOLDING THAT NEWSBOYS ARE NOT EMPLOYEES, WITH SUMMARY OF FACTS IN EACH CASE.

In *New York Indemnity Co. v. Industrial Accident Comm.*, 213 Cal. 43, 1 Pac. (2d) 12 (1931), newspapers were delivered to a newsboy daily by a district manager acting for two Los Angeles newspaper publishers. In the case of one newspaper ("Herald"), the newsboy paid 2¢ per copy, either at the time the papers were delivered to him or at the close of sales for the day. Unsold copies of such paper were not returnable. In the case of the other newspaper ("Record") sold by the boy, credit was given him for returned copies. In the case of both newspapers the newsboy's profits consisted of the difference between the price he paid and the price at which the publishers permitted him to resell. The newsboy was allotted a specified corner or street location by the district manager (an employee of the publishers), who instructed him "not to intrude upon or interfere with the corner or place allotted to another. Each . . . . newsboy was expected and in fact required to be active and vigilant in making sales of a prescribed minimum number of each of said newspapers . . . ; in short, to be a 'hustler' in making sales. Otherwise his allotted place or corner would be given to another newsboy and he would be refused further copies by the district manager. The latter testified that one of his duties as such district manager . . . . was to maintain a status of peace and harmony among the newsboys, and to so far supervise their daily conduct in the territory . . . as to promote the sale of the largest possible number of copies

of each of said newspapers . . . ." The California Workmen's Compensation Act at the time of this decision[90] defined "employee" as "every person in the service of an employer as defined in section seven hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written." (Sec. 7 referred to defined "employer" as ". . . every person . . . and corporation . . . who has any person in service under any appointment or contract of hire, or apprenticeship, express or implied, oral or written. . . .")

It was held that the newsboy was *not an employee* entitled to the benefits of this statute. The court stated (213 Cal. at 48, 49) that the "essential inquiry" was "whether the nature and degree of control exercised by the publishers . . . through their district manager, was such as would suffice to justify the finding of the Commission to the effect that newsboys . . . stood in relation of employees of the publishers . . . ." and concluded the "control which the publishers . . . undertook to exercise . . . would not as a matter of law be sufficient to constitute such newsboys . . . employees . . . We are satisfied that the finding of the Commission . . . amounted to an erroneous legal conclusion . . ."

This case was relied upon and approved in *State Compensation Ins. Fund v. Industrial Accident Comm.*, 216 Cal. 351, 14 Pac. (2d) 306 (1932), dealing with the status of a newspaper "routeman" and route carrier, and

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[90]This case was decided June 27, 1931. Effective August 14, 1931, an amendment to this statute became effective excluding from its operation "any person engaged in vending . . . any newspaper . . . where the title to such newspaper . . . has passed to the person so engaged . . ."

was followed in *Associated Indemnity Corp. v. Industrial Accident Comm.*, 115 Cal. App. 754, 2 Pac. (2d) 51 (1931), and *Hartford Acc. & Ind. Co. v. Industrial Accident Comm.*, 123 Cal. App. 151, 10 Pac. (2d) 1035 (1932), dealing with the status of newsboys.

In *Birmingham Post Co. v. Sturgeon*, 227 Ala. 162, 149 So. 74 (1933), the newsboy was assigned a certain "corner" by the company. He was required to call at the company's office at a certain hour each day to obtain a supply of papers. Subsequent editions were delivered to him at his corner at stated hours and he was required to be there to receive the same. He was not permitted to sell any papers except those published by defendant "except after checking in at defendant's office on Saturday nights." After reaching his corner he was permitted to sell papers *only* along a prescribed route, and at not less than the newspaper's published retail price. He could turn in unsold copies, but was required to account daily for all copies received less those turned in. If he failed to call for his first assignment of papers, another newsboy was assigned to his corner. The company had the right to dispense with his services "at any time they became unsatisfactory for any reason." The Alabama Workmen's Compensation Law defined "employer" as "every person . . . . who employs another to perform a service for hire and to whom the 'employer' directly pays wages," and provided also that, "The terms 'employee' and 'workman' are used interchangeably . . . ." It was pointed out (149 So. at 77) that under this statute the test of employment was whether defendant had the power to control the means and agencies by which the work was done. It was held that the newsboy was *not*

an employee under this statute. Although the court says (149 So. at 80):

> "We have recognized that our statute is to be liberally construed to the end that its wise and humane purpose may be advanced . . ."

it declares (149 So. at 79):

> "Under the facts as here presented, we think it clearly appears there was neither sufficient control exercised, or right to do so, reserved, as to support the relation of employer and employee."

In *Creswell v. Charlotte News Pub. Co.*, 204 N. C. 380, 168 S. E. 408 (1933), the newsboy was engaged by the company's supervisor, who turned over to him daily a certain number of newspapers on credit. Subsequent settlement was at the rate of 3¢ per copy, the newsboy retaining as his own the selling price above that rate. All unsold papers were returned at the end of the day. The newsboy was assigned a regular territory. The company's supervisor told the newsboy what the headlines were "and checked up the boys in order to ascertain if they were on the job or needed additional papers. If they did not stay on the beat assigned or were not active in the effort to sell papers, they lost their jobs." The newsboy solicited whom he chose "and otherwise conducted the selling according to his own notions and methods." The Workmen's Compensation Act of North Carolina defined "employee" to mean "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written." It was held that the newsboy was *not an "employee"* entitled to

the benefits of this Act. The court said (168 S. E. at 409):

> "While there was certain supervision exercised by the agent of defendant with respect to the territory assigned, *the control over the methods of selling was too uncertain, indefinite, and remote to constitute the relationship of employer and employee.*"

In *Bernat v. Star-Chronicle Pub. Co.*, ... Mo. App. ....., 84 S. W. (2d) 429 (1935), the newsboy agreed to pay for the papers of two newspaper publishing companies monthly at a wholesale rate and to sell only at the companies' established retail rate. His list of newspaper subscribers belonged to the company. The company reserved the right to sell to as many news dealers in the locality as it desired. If the newsboy failed to conduct his activities "to the entire satisfaction of the companies" then the latter could discontinue supplying him with papers. The newsboy was required to confine his activities to the town in which he lived, and was permitted to return unsold papers for credit. He was supposed to go to the railroad depot each day for the purpose of receiving his bundles of papers. The Missouri Workmen's Compensation Law defined "employee" as "every person in the service of any employer . . . under any contract of hire, express or implied, oral or written, or under any appointment or election." It was held that the newsboy was *not an employee* entitled to the benefits of this statute, the court saying (84 S. W. (2d) at 433):

> "Undoubtedly the form of definition employed indicates a legislative intent that . . . the term 'employee' shall be given a broad meaning

> *"Undoubtedly a certain limited right of supervision was exercised or at least reserved* to the companies so as to enable them to see to it that the final result contemplated by the arrangement was accomplished, but not such right of supervision over the methods, details, and particulars of the work as to give rise to the relationship of employer and employee. . . .
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> . . . . . .
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> ". . . Furthermore, it is significant that . . . . the two publications being sold by claimant at the time of his injury were strictly competitive and not complementary, which is an added reason for finding that his actual status was inconsistent with that of an employee of the two publishing companies."

In *Balinski v. Press Pub. Co.*, 118 Pa. Sup. 89, 179 Atl. 897 (1935), the company's district manager was instructed "to place" a newsboy on street corners in his district, the boy to have "more or less exclusive rights" to sell the paper in the vicinity of his corner. The company furnished the newsboys with money bags bearing the name of the newspaper as well as "shoulder straps" with which to display the papers. The district manager furnished the newsboys copies of the papers to be sold and each evening accepted back the unsold papers. He also occasionally offered a prize to the newsboy who would sell the most newspapers. The newsboys were required to report at their assigned corners as soon after school as possible. If a newsboy was habitually late at his corner for his first delivery of papers, "the corner would be taken away and further papers refused." Each newsboy was asked not to sell on corners assigned to other newsboys, or in front of drug stores selling the newspaper.

If he continued to do so his corner was taken away and further papers refused. The same result followed if the newsboy sold papers in excess of the price fixed, or sold the competing newspaper or "failed to sell a sufficient number of newspapers." Occasionally the company's supervisor told the newsboy "how to hold the papers, and urged them to cry out the sale . . ." The supervisor also made periodical rounds of inspection and if he was of the opinion that the newsboy was not making good, he informed the district manager, and if the latter was satisfied, the corner was taken away and further papers refused. Each newsboy was supposed to wait each evening until the district manager had come around and settled with him. It was held that the newsboy was *not an employee* under the Pennsylvania Workmen's Compensation Act. The court said (179 Atl. at 899):

> "The evidence establishes that Shanahan (the district manager) neither independently, nor as an agent of the appellant (newspaper), exercised such authority or control over the decedent (newsboy), or the newsboys generally, as to establish the relationship of master and servant, thus constituting the decedent an employee of the appellant."